

/ 00-1397

IN THE SUPREME COURT  
FOR THE STATE OF WISCONSIN

RICKY D. STEPHENSON, Individually  
and as Personal Representative for the  
ESTATE OF KATHY M. STEPHENSON,

Plaintiff-Respondent,

Appeal No. 00-1397

vs.

UNIVERSAL METRICS, INC.,  
WEST AMERICAN INSURANCE COMPANY  
and AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

Defendants,

and

JOHN H. KREUSER and SENTRY  
INSURANCE, a mutual company,

Defendants-Appellants.-Pet

*Muw 00-1397*  
Appeal Taken From The Decision Dated May 15, 2001  
Of The Court of Appeals, District I, Before  
Presiding Judge Charles B. Schudson

**BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS -Pet**

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## ISSUES PRESENTED

1. Does a guest at a company Christmas party have a duty to drive an intoxicated guest home and can the guest be liable for not doing so?

Disposition in Trial Court: Yes, based on Gritzner v. Michael R., 228 Wis. 2d 541, 598 N.W.2d 282 (Ct. App. 1998).

Disposition in Court of Appeals: Yes, based on Gritzner v. Michael R., 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906.

2. Does public policy preclude liability against a guest at a company Christmas party where that guest did not drive an intoxicated guest home?

Disposition in Trial Court: Not specifically addressed.

Disposition in Court of Appeals: Not specifically addressed.

3. Does sec. 125.035, Wis. Stats., provide immunity to a guest at a company Christmas party who indicated to a bartender that he would drive an intoxicated guest home, prompting the bartender to serve more alcohol to the intoxicated guest?

Disposition in Trial Court: No.

Disposition in Court of Appeals: No.

## **ORAL ARGUMENT AND PUBLICATION**

Oral argument is requested because the issues presented are one of first impression in Wisconsin. Publication is necessary to clarify these complex and interesting issues on duty, public policy and immunity for party guests, designated drivers and alcohol procurers, and to establish precedence for other courts to follow in this State.



## STATEMENT OF THE CASE

Universal Metrics, Inc. ("UMI") is a company located in Menomonee Falls, Wisconsin, that manufactures, machines and distributes metric products. (R.28; Ap. p. 146.) John H. Kreuser is employed by them as their head of Engineering and Quality Assurance. (R.28; Ap. p. 130.) Michael Devine, now deceased because of the subject motor vehicle accident, was employed in their manufacturing department. (R.28; Ap. p. 157.) Devine did not work in Kreuser's department. (R.28; Ap. p. 133.)

On December 4, 1998, UMI hosted a Christmas party for all of its employees at the Silver Spring Country Club in Menomonee Falls. (R.30; Ap. pp. 126-128.) Employees were permitted to bring a guest (R.30; Ap. pp. 126-128; R.28; Ap. p. 151.) Kreuser and his wife, Debra, attended the Christmas party. (R.28; Ap. p. 132.) Devine also attended. (R.28; Ap. p. 136.) There is nothing in the record to suggest that Devine brought a guest. Devine did not drive to the party with the Kreusers. They arrived separately. (R.28; Ap. p. 136.) Kreuser recalls seeing Devine at the party a couple of times over a span of several hours. (R.28; Ap. pp. 136-141.)

UMI bought the first two beverages for each guest at their Christmas party, because UMI provided each guest with two beverage

tickets. (R.30; Ap. pp. 126-128.) After that, guests would have to purchase their own beverages. (R.28; Ap. p. 155.) Alcohol was available and could be “purchased” with a ticket and after that purchased with a guest’s own money. (R.28; Ap. pp. 155-156.)

Devine consumed alcohol at the party to the point of becoming intoxicated and impaired. Devine drove himself from the party and was involved in a motor vehicle accident at approximately 10:40 p.m. with Kathy M. Stephenson. Both Stephenson and Devine died. Devine’s blood alcohol was recorded at .338. (R.30; Ap. pp. 168-169, 176-177.)

The plaintiff-respondent, Ricky D. Stephenson, individually and as the personal representative of the Estate of Kathy M. Stephenson (collectively “plaintiff”), brought this action for wrongful death against UMI, West American Insurance Company (UMI’s insurer), Kreuser, Sentry Insurance A Mutual Company (Kreuser’s homeowner’s carrier), and American Family Mutual Insurance Company (Devine’s automobile insurer). With respect to Kreuser, Plaintiff’s Amended Complaint alleges that sometime at the Christmas party Kreuser “assumed a duty to drive” Devine home so that Devine could “continue to consume alcoholic beverages without concern for operating a vehicle upon the roadway in an impaired state.” (R.12; Ap. p. 122.) The Amended Complaint alleges that

upon “assurance” from Kreuser that he would drive Devine home, a bartender at the Silver Spring Country Club “continued to serve alcoholic beverages” to Devine, leading to his impairment. (R.12; Ap. p. 122.). The Amended Complaint alleges that Kreuser “created a special relationship” between him and Devine, and that he breached his duty by leaving the party without taking Devine home. (R.12; Ap. pp. 122-123).

Depositions were taken of John Kreuser and Stanley Krueger, the president and CEO of UMI. (R.28; Ap. pp. 129-165.) No other depositions were taken in this case.

Prior to the civil suit, a criminal inquest was convened against UMI by the Waukesha County District Attorney. Transcripts from those proceedings were provided to the trial court, and the Court of Appeals, as way of background information. (R. 30; Ap. pp. 166-177.) However, no bartender or other representative of Silver Spring Country Club has given testimony in this civil action. No other guest of the party has given any deposition testimony. Although the bartender’s criminal inquest testimony would offer a different version of what transpired that evening than John Kreuser’s version (R. 30; Ap. pp. 170-175), it was understood for purposes of the trial court motions, and is understood now, that the bartender would not serve further alcohol to Devine unless she received some indication

that someone was going to take Devine home (i.e., not let him operate a motor vehicle). It was further understood for purposes of the trial court motions, and is understood now, that Kreuser did indicate by at the very least a nod of his head that he would take Devine home. (R.28; Ap. p. 138.) Based on Kreuser's nod of his head, the bartender served Devine the two drinks he had ordered. (R.12; Ap. p. 139.)

Kreuser testified at his deposition that he and his wife arrived at the party at approximately 6:30 p.m. (R.28; Ap. p. 136.) When they arrived they saw Devine at the main bar located outside the room in which UMI was having its party. (R.28; Ap. p. 136.) The Kreusers had a drink in the main bar, but they were not with Devine. (R.28; Ap. p. 136.) The Kreusers then went into the room where the company party was located. (R.28; Ap. p. 136.) Dinner was served around 7:00 p.m. in the party room, at which time Kreuser says he saw Devine at another table eating. (R.28; Ap. p. 137.) After the dinner, there was an awards presentation in the party room. (R.28; Ap. p. 137.) After the awards presentation, the party continued. (R.28; Ap. pp. 137-141.)

There was a smaller bar located in the party room. (R.28; Ap. p. 137.) Kreuser recalls it being staffed by one woman. (R.28; Ap. p. 137.) At about 8:30 p.m., after the dinner and awards presentation, Kreuser was standing with his back to that bar talking to his wife

Debra and another couple. (R.28; Ap. pp. 137-138.) Devine came up to the bar next to Kreuser. (R.28; Ap. p. 137.) Kreuser overheard Devine order some drinks from the bartender and the bartender asking Devine whether he had a ride home. (R.28; Ap. p. 137.) Kreuser turned, and Devine motioned to the bartender that Kreuser was his ride. (R.28; Ap. p. 138.) Kreuser then nodded his head to the bartender. (R.28; Ap. p. 138.) Kreuser thought they were “kidding around” and “did not think the conversation was serious at that point.” (R.28; Ap. p. 138.) The bartender then served Devine two drinks. (R.28; Ap. p. 139.) Devine returned with the drinks to his table. (R.28; Ap. p. 139.)

The bartender’s version, given only at the criminal inquest hearing, differs somewhat from Kreuser’s. (R.30; Ap. pp. 170-175.) She was subpoenaed and told by the district attorney that she was present in court because “we’re investigating the facts and circumstances leading to the deaths” of two people. (R.30; Ap. p. 170.) The bartender told the district attorney she was the only bartender at the smaller bar within the party room. (R.30; Ap. p. 172.) She said she had a concern over one individual, though she could not positively identify him as Michael Devine. (R.30; Ap. pp. 170-175.) She recalled others at the party commenting on his drunkenness. (R.30; Ap. p. 174.) She recalls after the awards presentation Devine

coming to her and ordering a beer. (R.30; Ap. pp. 173-174.) His speech was slurred. (R.30; Ap. p. 173.) She told him essentially that she could not serve him anymore alcohol, that he had enough to drink, and that he could not drive. (R.30; Ap. pp. 174-175.) She said Kreuser said, "Don't worry, I'll give him a ride," and "I promise I'll give him a ride home."<sup>1</sup> (R.30; Ap. p. 175.)

Around 9:00 or 9:15 p.m., at a different location within the party room, Devine asked Kreuser to buy him a drink. (R.28; Ap. p. 139.) Devine told Kreuser the bartender would not serve him. (R.28; Ap. p. 139.) Kreuser told Devine he could not buy him a drink. (R.28; Ap. p. 140.) That was Kreuser's last contact with Devine. (R.28; Ap. p. 140.) Kreuser does not recall seeing Devine in the party room after that. (R.28; Ap. pp. 140-141.) At about 10:00 p.m., the Kreusers decided not to give Devine a ride, and the Kreusers left.

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<sup>1</sup> It was understood for purposes of the dispositive motions that Kreuser indicated around 8:30 p.m. that he would take Devine home. The issue of his dismissal was and still is, therefore, a question of law. The bartender's differing version is, therefore, irrelevant. In addition, the bartender never offered testimony in this civil action. She was simply asked questions at a criminal inquest hearing by the district attorney and by the district attorney only. She was never cross-examined. These appellants were surprised, therefore, to see the weight attached to her version by the Court of Appeals (here and in their Decision in Appeal No. 1947 (Ap. pp. 186-198)), for two reasons. First, this bartender may have served Devine alcohol, prior to her cutting him off, which contributed to his intoxicated state. Second, it is not the role of an appellate court to weigh the credibility of witnesses, see, e.g., Christensen v. Economy Fire & Casualty Co., 77 Wis.2d 50, 62, 252 N.W.2d 81 (1977), particularly where the question is one of law in the first instance.

(R.28; Ap. p. 141.) It is not known from the record whether Devine left the country club before or after the Kreusers left.

Kreuser and Sentry moved to dismiss the plaintiff's Amended Complaint. (R.17.) In an order dated May 9, 2000, the trial court denied Kreuser's motion for summary judgment,<sup>2</sup> but granted a similar motion brought by his employer, UMI. (R.36, 47; Ap. pp. 112-113.) The trial court held that the host employer was immune, but that one of its guest employees, Kreuser, was not. The trial court said that Gritzner v. Michael R., 228 Wis. 2d 541, 598 N.W.2d 282 (Ct. App. 1998), imposed liability on Kreuser. (R.47.) After the trial court's hearing on this matter, Gritzner was affirmed by the Supreme Court. Gritzner v. Michael R., 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906.

Kreuser filed a Petition for Review of a Non-Final Order dated May 22, 2000. (R.37.) The Court of Appeals granted the Petition. (R.44.) Plaintiff also appealed the dismissal of UMI. (R.43.) Also at issue on plaintiff's appeal was whether Kreuser was within the course of his employment during the evening in question and, therefore, whether he would be provided insurance coverage under the UMI policy.

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<sup>2</sup> Although initially termed a motion to dismiss, the trial court treated it as a matter for summary judgment under sec. 802.08, Stats., because of the references to materials outside the pleadings.

In an Order dated September 25, 2000, the Court of Appeals did not consolidate the briefing on the separate appeals, but did consolidate the appeals for disposition. (Ap. pp. 199-201.) Later, the Court of Appeals decided to bifurcate the matters and issued two separate decisions. On May 15, 2001, the Court of Appeals issued its decision with respect to Kreuser's appeal, Appeal No. 00-1397. (Ap. pp. 101-111.) On July 24, 2001, the Court of Appeals issued its decision with respect to the UMI dismissal and the scope of employment and insurance coverage issue, Appeal No. 00-1947.<sup>3</sup> (Ap. pp. 186-198.)

In its May 15, 2001 decision, the Court of Appeals held first that, based on Gritzner v. Michael R., 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906, a person who nods to a bartender that it is okay to serve more alcohol because he will take an inebriate home, can be liable. (Ap. pp. 108-110.) Specifically, the Court of Appeals held that under Restatement (Second) of Torts § 324A (1965), Kreuser undertook to render services to another in which he knew or should have known that any failure to perform those services would create an unreasonable risk of harm to others:

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<sup>3</sup> Petitions for Review have been filed with the Supreme Court on Appeal No. 00-1947.



One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform]<sup>4</sup> his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

(Ap. pp. 108-110.) The Court of Appeals held that Gritzner's discussion of § 324A is "not limited" to an adult's liability for negligent failure to control a child's propensity to engage in inappropriate sexual acts with other children. (Ap. p. 110.)

Second, the Court of Appeals held that sec. 125.035, Stats., does not immunize Kreuser from his potential liability for negligent failure to perform the undertaking he allegedly promised. (Ap. pp. 110-111.) Contrary to the allegations in the plaintiff's Amended Complaint (R.12; Ap. pp. 122-123), the Court of Appeals stated that Kreuser "is not alleged to have furnished Devine with alcohol," and that his liability "does not rest on any allegation that he was, in the words of the statute, 'procuring alcohol beverages for or selling,

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<sup>4</sup> The correct word is "perform" not "protect." Miller v. Bristol-Myers Co., 168 Wis. 2d 863, 883, n. 7, 485 N.W.2d 31 (1992).

dispensing or giving away alcohol beverages to [Devine].”  
Sec. 125.035(2), Stats. (Ap. pp. 110-111.)

The Court acknowledged that allowing Kreuser to be held liable may be a “potentially ironic result,” but stated: “absent a legislative pronouncement requiring us to do so, we certainly will not relieve designated drivers, and others who volunteer to drive intoxicated individuals home, of liability for their failure to fulfill responsibilities they have assumed voluntarily.” (Ap. p. 111.)

On June 12, 2001, Kreuser and Sentry filed a request for reconsideration<sup>5</sup> of that part of the Court of Appeals’ decision in which it appeared that the Court in a footnote might be accusing counsel of lying. (Ap. pp. 178-183.) The Court of Appeals apologized on June 26, 2001 (Ap. pp. 184-185), and rewrote the footnote. (Ap. pp. 101-111.)<sup>6</sup>

On June 14, 2001, Kreuser and Sentry filed a Petition for Review to the Supreme Court. The Petition was granted on August 27, 2001.

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<sup>5</sup> Prior to July 1, 2001, the statutes technically did not allow for a “motion” for reconsideration.

<sup>6</sup> Appellants mistakenly attached to their Petition for Review the “old” Court of Appeals’ decision. The attached Appendix contains the official published version with the rewritten footnote.

## ARGUMENT

### **I. THERE IS NO DUTY ON A GUEST TO DRIVE AN INTOXICATED GUEST HOME FROM A PARTY**

Whether a duty exists is a question of law which the court reviews independent of the trial court. Coffey v. City of Milwaukee, 74 Wis. 2d 526, 531, 247 N.W.2d 132 (1976).

To establish a negligence claim, plaintiff must prove the existence of a duty of care on the part of a defendant, a breach of that duty, a causal connection between the breach and the injury, and damage resulting from the injury. See, e.g., Miller v. Wal-Mart Stores, Inc., 219 Wis. 2d 250, 260, 580 N.W.2d 233 (1998).

The first requirement is the establishment of a duty of care. "Each individual is held, at the very least, to a standard of ordinary care in all activities." Coffey, 74 Wis. 2d at 537. "A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable." Rolph v. EBI Companies, 159 Wis. 2d 518, 532, 464 N.W.2d 667 (1991).

A person is negligent who "does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject

a person or property to an unreasonable risk of injury or damage.” Wis. JI-Civil 1005. Wisconsin follows the Palsgraf dissent: “Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.” Palsgraf v. Long Island R.R., 248 N.Y. 339, 350, 162 N.E. 99 (1928) (Andrews, J., dissenting), adopted in Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 2d 229, 55 N.W.2d 29 (1952). See also Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956).

Against this backdrop, the Wisconsin Supreme Court has expressly chosen not to adopt the framework of Restatement (Second) of Torts §§ 314-324 (1965). Dixon v. W.I. Health Organization Ins. Corp., 2000 WI 95, ¶ 42, 237 Wis. 2d 149, 612 N.W.2d 721 (Abrahamson, J., concurring) (“This court has not adopted the Restatement’s provisions regarding the voluntary assumption of duties in evaluating negligence claims.”); Gritzner v. Michael R., 2000 WI 68, ¶ 22, 235 Wis. 2d 781, 611 N.W.2d 906 (“However, this court has not expressly adopted this framework.”); Schuster v. Altenberg, 144 Wis. 2d 223, 238 and n.3, 424 N.W.2d 159 (1988).

Despite the Supreme Court expressly stating that in evaluating negligence claims it does not adopt the Restatement provisions regarding the voluntary assumption of duties, the trial court and Court of Appeals did just that. (Ap. pp. 108-110.) The Wisconsin Supreme

Court also stated in Gritzner: “We would recognize the Gritzners’ claim for negligent failure to control only because liability for failure to control can be imposed on distinct, narrow grounds that do not raise the same public policy considerations that preclude liability for failure to warn.” Gritzner, 2000 WI at ¶ 5.

The trial court and Court of Appeals erred in applying Gritzner to a situation involving the obligations of guests at a party. Gritzner involved issues of *in loco parentis* and obligations of an adult charged with the care of a minor child. Such a situation can hardly be compared to adult guests attending a company-sponsored Christmas party. In Gritzner, the adult in charge of the four-year-old consented to the four-year-old’s presence on his property, and the four-year-old’s parents entrusted their child to the adult. The complaint in Gritzner alleged that the adult failed to supervise or control an older child despite knowledge that the older child would engage in inappropriate sexual acts with the four-year-old if the four-year-old were left unsupervised.

The duty question in this case should not be whether Kreuser voluntarily assumed a duty to drive Devine home, but rather whether it was foreseeable that Kreuser’s act or omission to act may cause harm to someone. The trial court and Court of Appeals should not have departed from longstanding negligence principles and engaged in

semantic gymnastics in an effort to justify a duty that does not exist in the first place.

Under Wisconsin's broad definition of duty, we do not engage in analytical gymnastics to arrive at our result by first noting that at common law, a person owes no duty to control the conduct of another person or warn of such conduct, and then finding exception to that general rule where the defendant stands in a special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of the conduct. See, e.g., Restatement (Second) of Torts §§ 314-20 (1965), and Tarasoff, 17 Cal. 3d at 435-36, 551 P.2d at 343, 131 Cal. Rptr. at 23.

Schuster, 144 Wis. 2d at 238 n.3.

Kreuser is unable to find any published decision in Wisconsin which has held that there is a duty on a party guest to drive an intoxicated guest home. The Court of Appeals' decision in this case, however, imposes such a duty. The essential premise of the Court of Appeals' holding is that since Kreuser volunteered to take Devine home, Kreuser had a duty thrust upon him, which if breached would result in liability.

If courts are going to start imposing liability on party guests for not following through with Good Samaritan undertakings of driving inebriates home, then it would seem to follow that there would be a duty to drive the inebriates home in the first place. Put another way, once someone volunteers to drive someone home who has had too much to drink, there can be liability on the volunteer under the Court

of Appeals' analysis. That is because of the potential for injury to third parties in the event the volunteer does not drive the inebriate home. That potential for injury exists, however, regardless of the voluntary undertaking. Therefore, the logical extension of the Court of Appeals' analysis is that if a person knows or should know that someone is legally intoxicated, that person has a duty to drive that inebriate home. After all, one owes a duty when it is foreseeable that his act or omission to act may cause harm to someone. A.E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 483-84, 214 N.W.2d 764 (1974).

The Supreme Court has stated that "limitations do exist with respect to the imposition of a legal duty in some cases." Rockweit v. Senecal, 197 Wis. 2d 409, 421, 541 N.W.2d 742 (1995). "Like most jurisdictions, Wisconsin does not generally impose a duty upon persons to protect others from hazardous situations." Erickson v. Prudential Ins. Co., 166 Wis. 2d 82, 88, 479 N.W.2d 552 (Ct. App. 1991).<sup>7</sup>

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<sup>7</sup> These appellants acknowledge some question over the basis of these holdings and therefore request that they be strengthened by the Court. Erickson cites to Winslow v. Brown, 125 Wis. 2d 327, 331, 371 N.W.2d 417 (Ct. App. 1988) ("generally no duty exists to protect others from hazardous situations"). In support of this proposition Winslow relies on De Bauche v. Knott, 69 Wis. 2d 119, 122-23, 230 N.W.2d 158 (1975). Although De Bauche reiterated the defendant's argument by citing 57 Am. Jur. 2d, Negligence, § 41 ("... there is no general duty to come to the assistance of a person who is so ill or intoxicated as to be unable to look out

In Zelco v. Integrity Mutual Ins. Co., 190 Wis.2d 74, 527 N.W.2d 357 (Ct. App. 1994), the Court of Appeals stated: "Wisconsin has not recognized the social host/guest association as a special relationship." Id. at 79. In Zelco, Norenberg was hosting a party. She asked Hitsman to leave because of his conduct. He left, but returned a short time later. Norenberg again asked Hitsman to leave. Zelco, another guest, bear-hugged Hitsman, but ended up falling and injuring himself. Zelco alleged that Norenberg was negligent. The Court of Appeals held that the host, Norenberg, had no duty to protect her guests from injuries suffered when confronted by another guest. Id. at 79. If a host has no obligation to protect a guest from injuries by another guest, then logic would follow that a guest has no duty to protect a guest or other third person from injuries.

For the first time in this State there is a published appellate decision creating a duty on a party guest to drive an intoxicated guest

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for himself .... there is no general duty to go to the rescue of a person who is in peril ....") and Prosser, Law of Torts § 54 ("the law has persistently refused to recognize the moral obligation ... to come to the aid of another ...."), it would appear the Supreme Court declined to accept the defendant's proposition and instead relied on A.E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 483, 214 N.W.2d 764 (1974) ("A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone."). Subsequent decisions, however, would appear to have adopted as law of the case the argument presented by the defendant in De Bauche. Lloyd v. S.S. Kresge Co., 85 Wis. 2d 296, 303, 270 N.W.2d 423 (Ct. App. 1978); Winslow, 125 Wis. 2d at 331; Erickson, 166 Wis. 2d at 88; Zelco, 190 Wis. 2d at 79; Rockweit, 197 Wis. 2d at 421.



home from a party. To impose that duty means that at any social event where alcohol is served, be it a backyard barbeque, an awards banquet, or an athletic event, there will be a duty on mere guests at those events to drive another guest home if they know or should know that the other guest is legally intoxicated to the point of impairment. The Supreme Court should hold that there is no duty on a party guest to drive an inebriated guest home.

## **II. PUBLIC POLICY CONSIDERATIONS PRECLUDE LIABILITY AGAINST KREUSER**

A finding of non-liability in terms of public policy is a question of law that can only be decided by the Supreme Court. Gritzner, 2000 WI 68 at ¶ 27; Rockweit, 197 Wis. 2d at 425; Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 737, 275 N.W.2d 660 (1979).

The Supreme Court has held that “it is not always necessary to remand for trial prior to addressing public policy considerations.” Schuster, 144 Wis. 2d at 241. “This Court has noted that application of the public policy tests as to recovery of damages ‘... does not in all cases require a full factual resolution of the cause of action by trial before policy factors will be applied by the Court ....’” Rieck v. Medical Protective Co., 64 Wis. 2d 514, 520, 219 N.W.2d 242 (1974) (*quoting* Hass v. Chicago and Northwestern Ry. Co., 48 Wis. 2d 321, 326-27, 179 N.W.2d 885 (1970)).

“[W]hen the facts are not complex and the relevant public policy questions have been fully presented, this Court may determine whether public policy precludes liability before trial.” Gritzner, 2000 WI 68 at ¶ 26; Sawyer v. Midelfort, 227 Wis.2d 124, 141, 595 N.W.2d 423 (1999); Miller, 219 Wis. 2d at 265, Schuster, 144 Wis. 2d at 241.

Public policy should preclude liability for this newly created tort. “In Wisconsin, the doctrine of public policy, not the doctrine of duty, limits the scope of the defendant’s liability.” Bowen v. Lumbermen’s Mut. Casualty Co., 183 Wis. 2d 627, 644, 517 N.W.2d 432 (1994). “The consistent analyses of this Court reveal that the question of duty is not an element of the Court’s policy determination.” A.E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 484, 214 N.W.2d 764 (1974).

It is recognized by this and other courts that even where the chain of causation is complete and direct, recovery against the negligent tort-feasor may sometimes be denied on the grounds of public policy because the injury is too remote from the negligence or too “wholly out of proportion to the culpability of the negligent tort-feasor,” or in retrospect appears too highly extraordinary that the negligence should have brought about the harm, or because the allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way to fraudulent claims, or would “enter a field that has no sensible or just stopping point.”

Colla v. Mandella, 1 Wis. 2d 594, 598-99, 85 N.W.2d 345 (1957) (citing Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497 (1935), *overruled on other grounds* by Bowens v. Lumbermen's Mut. Casualty Co., 183 Wis. 2d 627, 517 N.W.2d 432 (1994)).

“[O]nce it is determined that a negligent act has been committed and that the act is a substantial factor in causing the harm, the question of duty is irrelevant and a finding of non-liability can be made only in terms of public policy.” Schuster v. Altenberg, 144 Wis. 2d 223, 235, 424 N.W.2d 159 (1988) (quoting A.E. Investment Corp., 62 Wis. 2d 479, 484-85, 214 N.W.2d 764 (1974)).

The Court of Appeals' published decision affects every single event in Wisconsin where alcohol might be served, be it a company party, backyard barbeque, awards banquet or professional sports event. If we assume that everyone attends such events occasionally, if not frequently, the Court of Appeals' decision impacts every person in this State.

Unfortunately, the decision has a chilling effect on designated drivers and driver programs (formal and informal), and taxicab services. As an example, if an inebriate calls a designated driver from a tavern and the inebriate is told the driver will be there in 15 minutes, and for whatever reason the driver does not show up in 15 minutes so the impatient inebriate leaves before the driver arrives, is the driver

liable for the inebriate's accident because he or she was late? The Court of Appeals says "yes," because the Court of Appeals specifically held that it "will not relieve designated drivers, and others who volunteer to drive intoxicated individuals home, of liability for their failure to fulfill responsibilities they have assumed voluntarily." (Ap. p. 111.)

If that is the case, no taxi service will agree to pick up anyone who has been drinking because they will not want to assume responsibility for an inebriate over whom they have no control. The same concerns affect designated drivers who, through their Good Samaritan acts of trying to keep intoxicated drivers off the road, now face liability. The current published decision therefore discourages people from voluntarily agreeing to drive inebriates home.

This accident was caused by Michael Devine voluntarily drinking himself to impairment, plain and simple. He was an adult who was responsible for his own actions. He chose to drink to excess and then to get behind the wheel of an automobile and drive from the party. There is no suggestion in the record that Devine attempted to contact Kreuser for a ride prior to his leaving the party. There is nothing in the record establishing that the Kreusers left the country club before Devine left the country club.

Allowance of recovery against Kreuser would place too unreasonable a burden upon party guests, guests at awards banquets, guests at athletic events, etc., and would enter a field that has no sensible or just stopping point. Guests at events now have to analyze whether someone they encounter, perhaps a complete stranger, has had too much to drink. The guest has to make a judgment call as to whether that person is over the legal limit and whether they should intervene and prevent that person from driving home. Alcohol affects people differently, depending on the person's weight, how much they have had to drink, what they have had to drink, how much they have had to eat, etc. People also act and react differently when they are intoxicated. One individual at just over the legal limit, say .11 for instance, can appear fine to one observer, while another at that level can appear impaired to another observer. Now, ordinary citizens with no expertise in toxicology have to decide whether a person is over or under the legal limit for intoxication.

The Court of Appeals' decision will not be limited to parties at country clubs and parties sponsored by employers. An attendee at a football game, where thousands of strangers surround him or her, can be held liable because he or she encounters someone in the crowd who has had too much to drink. He or she is supposed to approach the inebriate, even though the inebriate may be a complete stranger, tell

the inebriate to turn over their car keys, tell the inebriate that he or she is going to drive them home, tell the inebriate that a relative or friend of the inebriate is going to have to come pick them up, etc.

What is particularly disconcerting about the Court of Appeals' decision is that it flies directly in the face of the broad immunity provided to taverns, country clubs, party hosts, and other providers and servers of alcohol.<sup>8</sup> Bear in mind that the provider of alcohol can encourage a guest to drink to the point of intoxication and encourage them to drive home, but not be held liable for reasons of statutory immunity. Yet now, under the Court of Appeals' decision, a mere guest at that party can be held liable if all the guest does is agree to take the inebriate home, and then for whatever reason, does not take the inebriate home or is not able to take the inebriate home.

As an example of the gross inequity of the situation, consider someone having a party at their home which involves alcohol. The host/provider can encourage a particular guest to drink to excess, can encourage the inebriate to drive home, can walk the inebriate to his or her car, put the inebriate in the driver's seat, and hand the car keys to the inebriate. The host can wave to the inebriate as the inebriate weaves down the street in an erratic fashion. Regardless of what one

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<sup>8</sup> With the exception of those who (1) cause the alcohol consumption by force, (2) misrepresent the alcoholic content of the beverage, or (3) should know that the person was underage. Sec. 125.035, Stats.

might say about the host's moral responsibility, the law holds the host legally immune.

Using the same example above except substituting the host with a guest, a guest at the party can encourage a fellow guest to drink to excess, can encourage the fellow guest to drive home in an inebriated state, can walk the inebriate to his or her car, can hand the keys to the inebriate, and can wave to the inebriate as the inebriate drives down the road weaving in and out of lanes. The guest is not legally liable for any injuries produced by the inebriate. Interestingly, however, if the guest should indicate earlier in the evening that he or she will take the inebriate home, then the guest is legally liable per the Court of Appeals' decision in this case.

Perhaps the most telling example of the problem with saying Kreuser can be liable in this case, is illustrated as follows. Imagine the same scenario with the host encouraging his or her guest to drink to excess and drive home in that inebriated state. If, earlier in the evening, the host (the one who purchased, furnished and served the alcohol to the guest) indicated that he or she was going to take the guest home, and then for whatever reason the host did not or could not take the guest home, the host would not be liable because the host is immune as a "provider" of alcohol under sec. 125.035. However, if a

guest gave the indication that he or she would take the inebriate home, then the guest is not immune and is liable.

This absurd result must be corrected by the Supreme Court. There can be absolutely no justification for allowing the literal provider of alcohol to be absolved from liability, but not the mere guest. For the Court of Appeals to suggest that this result is "ironic" (Ap. p. 111) is a gross understatement.

### **III. SEC. 125.035, WIS. STATS., APPLIES TO KREUSER.**

The application of a statute to a set of facts is a question of law. Kania v. Airborne Freight Corp., 99 Wis. 2d 746, 758, 300 N.W.2d 63 (1981). The meaning of a statute is a question of law. DOR v. Milwaukee Brewers Baseball Club, 111 Wis. 2d 571, 577, 331 N.W.2d 383 (1983).

This Court reviews the construction and application of the language of a statute *de novo*. See First Nat'l Leasing Corp. v. City of Madison, 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977). This Court need not show deference to the trial court's decision on the issue. Id.

In construing a statute, this Court must attempt to discern the intent of the legislature. See Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992). This Court must give effect



to every word of a statute. See State ex. rel. Reimann v. Circuit Court for Dane County, 214 Wis. 2d 605, 571 N.W.2d 385 (1997).

A statute must be examined as a whole and no part is to be rendered superfluous. Lake City Corp. v. City of Mequon, 207 Wis. 2d 155, 558 N.W.2d 100 (1997). When construing one section of a statute, other related sections must also be considered. See Beard v. Lee Enterprises, Inc., 225 Wis. 2d 1, 11, 591 N.W.2d 156 (1999).

Kreuser should be afforded the same immunity that all others associated with the procurement of alcohol are afforded. Wisconsin's liquor liability immunity statute is contained in sec. 125.035, Stats. Subsection (2) states:

A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.

(Emphasis added.)

The issue is whether Kreuser was "procuring" alcohol beverages when he nodded to the bartender, thus allowing the bartender to serve the alcohol to Devine. Plaintiff specifically and expressly alleges in the Amended Complaint that Kreuser's assurance that he would drive Devine home led to the Silver Spring Country Club personnel to continue to serve Devine alcohol beverages:

39. The defendant, John Kreuser, voluntarily assumed a duty to drive the deceased, Michael T. Devine, home from the gathering referred to herein, so that he could not operate a motor vehicle upon the roadway in an impaired state.
40. The defendant, John J. Kreuser, assumed said duty by notifying Silver Spring Country Club personnel that Michael T. Devine would continue to consume alcoholic beverages without concern for operating a motor vehicle upon the roadway in an impaired state in that he would see that he did not operate a motor vehicle in said condition and would drive him safely home.
41. Upon the assurance of John J. Kreuser that Michael T. Devine could continue to drink to the point of, and beyond, impairment without concern for operating a motor vehicle upon the highways, Silver Spring Country Club personnel continued to serve alcoholic beverages to Michael T. Devine.
42. The continued consumption of alcoholic beverages after said assurance, led to the impairment of Michael T. Devine's ability to operate a motor vehicle.
43. Through his conduct and assurance, the defendant, John J. Kreuser, created a special relationship and/or circumstances between he and Michael T. Devine whereby said defendant had a duty to exercise ordinary care in taking reasonable precautions to prevent Michael T. Devine from driving from the meeting referred to herein in an impaired state.
44. The defendant, John J. Kreuser, breached said duty in that he failed to exercise ordinary care in taking reasonable precautions to prevent Michael T. Devine from operating his motor

vehicle in an impaired state in that he took no steps to see that Michael T. Devine did not leave the meeting within his motor vehicle in an impaired state, did not notify the Silver Spring Country Club personnel that his mind had changed and that he would not give a ride to Michael T. Devine, nor, did he notify Michael T. Devine that he had changed his mind and would not give a ride to Michael T. Devine, all of which led to the continued consumption of alcoholic beverages, thereby causing impairment to Michael T. Devine's ability to operate a motor vehicle.

45. The defendant, John J. Kreuser, was negligent with respect to the breach of said duty, with said negligence being a substantial and proximate cause of Michael T. Devine operating a vehicle upon the roadway in an impaired state, causing the collision referred to herein.
46. The negligence of the defendant, John J. Kreuser, was a substantially and proximate cause of the personal injury and wrongful death of Cathy M. Stephenson, thereby causing damages to the plaintiffs herein.

(R.12; Ap. pp. 122-123.)

The word "procure" as used in the statute is broad enough to encompass Kreuser's action in this case as alleged by plaintiff in the amended complaint. "Procure" is synonymous with aiding or abetting, or "obtaining" or "bringing about," as defined by the Wisconsin Supreme Court in Vogel v. State, 138 Wis. 315, 119 N.W. 190 (1909).

More specifically and more recently, the Wisconsin Supreme Court in Miller v. Thomack, 210 Wis.2d 650, 563 N.W.2d 895 (1997), discussed extensively the definition of “procure” as used in sec. 125.035, Stats.

The statutes do not define the word procure and the legislative history is silent. We construe the statutory language to effectuate the intent of the legislature. One rule of construction is to assume that the legislature intended to use words and phrases according to their ordinary and accepted meanings.

The court of appeals’ analysis relied on the dictionary definition of procure to discern the ordinary and accepted meaning of the word and thus the legislative intent. The dictionary definition is as follows:

1a(1) to get possession of: OBTAIN, ACQUIRE...esp. to get possession of by particular care or effort...and sometimes by devious means...2a(1) to cause to happen or to be done: bring about: EFFECT...

Id. at 661-62 (emphasis added) (*citing* Webster’s Third New International Dictionary 1809 (1961)).<sup>9</sup>

Miller specifically recognized that “procure” should be treated broadly: “Words such as furnish and provide are similar to procure in the Wisconsin statute. Procure, however, distinct from furnish or provide, may encompass a greater range of circumstances.” Id. at 665 (emphasis added).

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<sup>9</sup> When not specifically defined in a statute, a non-technical term should be given its ordinary and accepted meaning, which may be ascertained from a recognized dictionary. State v. Steenberg Homes, 223 Wis. 2d 511, 519 n.3, 589 N.W.2d 668 (Ct. App. 1998).

Plaintiff alleges that Kreuser essentially procured alcohol for Devine by notifying the bartender that Devine could drink more because Kreuser would later give Devine a ride home. Kreuser's actions fall within the "greater range of circumstances" discussed in Miller.

The Court of Appeals, however, never once mentioned Miller or the definition of "procure." (Ap. pp. 110-111.) The Court of Appeals just summarily stated that it will not "expand the statute beyond its clear and unambiguous scope as intended by the legislature," without once even discussing what "procure" means. (Ap. p. 111.)

The Court of Appeals also summarily dismissed out of hand Greene by Schoone v. Farnsworth, 199 Wis. 2d 365, 525 N.W.2d 107 (Ct. App. 1994) (Ap. p. 111). In Greene, the inebriate was drinking with friends for a period of over nine hours. The inebriate's friends encouraged him to drink and also to operate a motor vehicle. In the course of operating the motor vehicle, the inebriate drove up onto a sidewalk and injured several children. The plaintiffs sought damages from the inebriate as well as his drinking companions, alleging that the companions conspired to render assistance and encouragement to the inebriate in the commission of the unlawful act of operating a vehicle while intoxicated.

The Wisconsin Court of Appeals specifically ruled that the encouragement by the defendant's drinking companions fell within the scope of sec. 125.035, Stats.

Further, construing sec. 125.035(2), Wis. Stats., to allow a cause of action for conspiracy in a situation where a person drives drunk and injures someone would create an exception so great that it would swallow the non-liability rule and lead to unreasonable results. Taverns, businesses, social hosts and drinking companions would be exposed to lawsuits for serving alcohol based on the theory that they were part of a conspiracy to encourage intoxication and drunk driving. When interpreting a statute, we must avoid such absurd or unreasonable results.

Id. at 372 (*citing* Kwiatkowski v. Capital Indemnity Corp., 157 Wis. 2d 768, 774-75, 461 N.W.2d 150, 153 (Ct. App. 1990)) (emphasis added).

The facts in Greene were more egregious than those here. In Greene, the drinking companions did far more than Kreuser. They encouraged the inebriate to drink to excess knowing full well he would operate a motor vehicle. Yet, the court found that to not find the companions immune would lead to "absurd or unreasonable results." Id. at 372.

Kreuser did not encourage Devine to drink to excess. They were not at the party together. They were not drinking companions. Kreuser only saw Devine a couple of times over a span of several hours. (R.28; Ap. pp. 136-141.)

Assuming arguendo Kreuser and Devine were drinking companions and Kreuser encouraged Devine to drink to excess, Greene says Kreuser would be immune. However, according to the Court of Appeals, Kreuser is not immune when, even though he did not purchase a drink for Devine or encourage Devine to drink, Kreuser did not take Devine home. The decision's conflict with Greene must be rectified.

As plaintiff specifically alleges, Kreuser's liability arises out of Devine's excessive consumption of alcohol and subsequent operation of an automobile. (R.12; Ap. pp. 122-123.) Greene expressly rejects liability on drinking companions under this scenario. Greene even suggests that intentional conduct (conspiracy) is immunized under sec. 125.035, Stats. Id. at 372. Thus, even if Kreuser intentionally failed to carry out his obligation, the scope of sec. 125.035 would immunize his actions under Greene.

Greene reintroduces the common law principle that an individual is not responsible for an adult's intoxicated actions. Section 125.035, Stats., reinstituted the common law non-liability rule that was abandoned in Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970). The general common law rule precluded liability against an individual who procured alcohol for another based on

public policy. See, e.g., Seibel v. Leach, 233 Wis. 66, 288 N.W. 744 (1939).

Plaintiff alleges that Kreuser procured alcoholic beverages for Devine by signaling to a bartender that Devine could drink more because he would get a ride home with Kreuser. (R.12; Ap. pp. 122-123.) The legislature provided broad immunity under sec. 125.035 to all individuals who interact with an intoxicated individual who later cause injury due to his or her intoxication. To allow recovery against someone who may have assisted an inebriated driver to become intoxicated “would create an exemption so great that it would swallow the non-liability rule and lead to unreasonable results.” Greene, 199 Wis. 2d at 372.

The court of appeals acknowledged that imposing liability on Kreuser is “a potentially ironic result.” (Ap. p. 111.) If the result is “ironic” it must be corrected. The liquor liability immunity statute was not meant to only afford immunity to the country club and employer who served and paid for the alcohol that Devine consumed. If the law in Wisconsin is that taverns, social hosts, businesses and drinking companions are immune from liability, then non-drinking companions like Kreuser should likewise be immune.

Without reversal by the Supreme Court, the law as it currently stands is that if one is intimately involved with the providing of



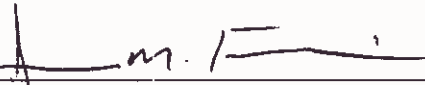
alcohol (i.e. purchasing, providing and encouraging the drinking), one cannot be liable. But if one is only tangentially involved with the alcohol (a non-companion who merely offered a ride), one can be liable. This inequity can easily be corrected by holding that Kreuser is likewise afforded the same immunity.

### CONCLUSION

For the foregoing reasons, Kreuser and Sentry respectfully request that the Supreme Court reverse the Court of Appeals and remand the case to the trial court directing the trial judge to grant Kreuser and Sentry's motion for summary judgment dismissing them from this case.

Respectfully submitted this 25 day of September, 2001.

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### CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), STATS., for a brief produced using the following font:

- ☐ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side, and 1 inch margins on the other 3 sides. The length of this brief is \_\_\_\_\_ pages.
- ☒ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7,793 words.

Dated this 25 day of September, 2001.

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## **APPENDIX**

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No. 00-1397

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

RICKY D. STEPHENSON, INDIVIDUALLY AND  
AS PERSONAL REPRESENTATIVE FOR THE  
ESTATE OF KATHY M. STEPHENSON,

PLAINTIFF-RESPONDENT,

v.

UNIVERSAL METRICS, INCORPORATED,  
AMERICAN FAMILY MUTUAL INSURANCE  
COMPANY AND OHIO CASUALTY INSURANCE  
COMPANY, WEST AMERICAN  
INSURANCE COMPANY,

DEFENDANTS,

JOHN H. KREUSER AND SENTRY INSURANCE,  
A MUTUAL INSURANCE,

DEFENDANTS-APPELLANTS.

FILED

June 26, 2001

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COURT OF APPEALS  
OF WISCONSIN

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PLEASE TAKE NOTICE that corrections were made to paragraph 4, and footnote 3 in the above-captioned opinion which was released on May 15, 2001. A corrected electronic version in its entirety is available on the court's website at [www.courts.state.wi.us](http://www.courts.state.wi.us).

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 15, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1397

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

---

**RICKY D. STEPHENSON, INDIVIDUALLY  
AND AS PERSONAL REPRESENTATIVE  
FOR THE ESTATE OF KATHY M.  
STEPHENSON,**

**PLAINTIFF-RESPONDENT,**

**V.**

**UNIVERSAL METRICS, INCORPORATED,  
AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY AND OHIO  
CASUALTY INSURANCE COMPANY,  
WEST AMERICAN INSURANCE  
COMPANY,**

**DEFENDANTS,**

**JOHN H. KREUSER AND SENTRY  
INSURANCE, A MUTUAL INSURANCE,**

**DEFENDANTS-APPELLANTS.**

---

A.103

APPEAL from an order of the circuit court for Milwaukee County:  
VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 SCHUDSON, J. John H. Kreuser and his insurer, Sentry Insurance (collectively, "Kreuser") appeal from the nonfinal circuit court order denying their motion for summary judgment.<sup>1</sup> Kreuser argues that the court erred in concluding that WIS. STAT. § 125.035(2) (1997-98),<sup>2</sup> which he characterizes as "Wisconsin's Liquor Liability Immunity Statute," did not immunize him from liability for his alleged conduct in failing to drive another adult home after stating that he would do so.

¶2 We conclude that the circuit court correctly determined that Kreuser's alleged conduct fell outside the parameters of the immunity granted under WIS. STAT. § 125.035(2). We further conclude that Kreuser's alleged conduct is encompassed by the standards declared in RESTATEMENT (SECOND) OF TORTS § 324A (1965), adopted by the Wisconsin Supreme Court and most recently reiterated in *Gritzner v. Michael R.*, 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906. Accordingly, we affirm.

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<sup>1</sup> In an order dated August 8, 2000, we granted leave to appeal from the May 9, 2000 nonfinal order, but specified that interlocutory review would encompass only the circuit court's denial of the petitioners' motion for summary judgment.

<sup>2</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

## I. BACKGROUND

¶3 According to the amended complaint, on December 4, 1998, Kreuser was attending a “meeting” at the Silver Spring Country Club; the meeting was held by his employer, Universal Metrics, Inc., to “further the business interests of UMI by way of creating good will between it and it’s [sic] employees, and for purposes of increasing employee morale.” Among the other Universal employees at the meeting was Michael T. Devine, who became intoxicated. Kreuser assured Silver Spring personnel that he would drive Devine home. Kreuser, however, failed to do so. Devine, driving away from the country club, crossed the center line on Silver Spring Road and struck a motor vehicle driven by Kathy Stephenson. Both Devine and Stephenson died as a result of the collision.

¶4 Marge Kubowski, a Silver Spring bartender, testified at the inquest into the deaths of Stephenson and Devine. Her testimony, included in the summary judgment submissions, told of Kreuser’s assurance that he would drive Devine home:

A: ... People just were making different comments about [Devine]. And at one point he came up to the bar and ordered a beer, and that is when I noticed that he had [had] too much to drink and I couldn’t serve him.

Q: ... Do you recall at that point expressing concern that he should not drive, or he should get a ride?

A: That’s correct.

Q: How did you express, did you verbalize that?

A: Yes, I did, more than once.

Q: And did you get any response from anybody?

A: Yes, I did.

Q: From who[m]?

A: A guy [Kreuser] that was standing by the bar that was standing next to this particular guy [Devine] that was not getting anything else to drink.



Q: What kind of response did you receive?

A: He acted like I was kidding at first, you know. He kind of chuckled back. And I said, "I'm being very serious. This man needs a ride home. He cannot leave this country club in this condition." And he said, "Don't worry, I'll give him a ride." And I said, "Are you sure?" And he said, "I promise I'll give him a ride home."

Kreuser, however, remembered it differently. At his deposition, he testified:

Q: Okay. After hearing the bartender ask Mike D[e]vine whether he had a ride home, what did you do?

A: I had just turned to see what was going on, more or less, and Mike had made a motion like I was it.

Q: All right. And he made a motion with his head?

A: Yes.

Q: So you interpreted his motion to be a signal to the bartender to you that you were his ride home?

A: Uh-huh.

Q: Is that a yes?

A: Yes.

Q: So you saw him do that?

A: Yes.

Q: And she was looking at him when—the bartender was looking at him when he did that?

A: Yes.

Q: And what did you do in response to that?

A: I just nodded my head.

Q: To who?

A: To the bartender.

Q: And by nodding your head you were indicating to the bartender that you were going to give him a ride home, correct?

A: Yes.

Irrespective of which version is correct (and we, of course, may not find facts, see *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals is precluded from making factual determinations when evidence is

controverted)), the upshot of both versions is that Kreuser voluntarily agreed to drive Devine home.<sup>3</sup>

¶5 Kathy Stephenson's husband, individually and as the personal representative of her estate, brought an action against several defendants including Universal, Kreuser, their insurers, and the insurer providing both liability coverage to Devine and underinsured motorist coverage to Kathy Stephenson. The circuit court granted summary judgment to Universal and its insurer, West American, concluding that, pursuant to *Greene v. Farnsworth*, 188 Wis. 2d 365, 525 N.W.2d 107 (Ct. App. 1994), under WIS. STAT. § 125.035(2), they were immune from

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<sup>3</sup> Kreuser's brief-in-chief to this court, without providing any record reference, states: "Kreuser said nothing, but simply nodded his head once affirmatively." Further, neither of Kreuser's briefs on appeal referred us to Kubowski's inquest testimony, in which she stated that Kreuser did more than merely "nod" his assent to assuming the burden of driving Devine home.

Under our view of the Rules of Professional Conduct for Attorneys, a lawyer has a duty to disclose important information to an appellate tribunal even though it may be adverse to his or her client's position. See SCR 20:3.3(a)(3) (2000) ("A lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."). And, of course, lawyers may not knowingly make any misrepresentation to a tribunal. See SCR 20:3.3(a)(1) (2000) (forbidding counsel from knowingly "mak[ing] a false statement of fact or law to a tribunal").

Here, we recognize that Kreuser's counsel's representations were ones of fact, not law, and that the countervailing factual version subsequently was presented by Stephenson's counsel in respondent's appellate brief. We also accept that Kreuser's counsel accurately related Kreuser's version of what took place. An acknowledgment of Kubowski's version, however, would have been appropriate under the rules of appellate procedure. See WIS. STAT. § 809.19(1)(d) (appellant's brief must contain a statement of the case, which is required to include "a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record"). (Emphasis added.) We also remind counsel that the rules require a record reference for each statement of fact presented in a brief. See *id.*

liability. The court also concluded, however, that under *Gritzner v. Michael R.*, 228 Wis. 2d 541, 598 N.W.2d 282 (Ct. App. 1999),<sup>4</sup> Kreuser was not immune.

## II. DISCUSSION

¶6 As this court has explained:

“Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and ‘to avoid trials where there is nothing to try.’” While we apply the same methodology as the trial court when reviewing summary judgment, we owe no deference to the conclusion of the trial court. We first examine the pleadings to determine whether they state a claim for relief. If the pleadings state a claim and the responsive pleadings join the issue, we then must examine the evidentiary record to analyze whether a genuine issue of material fact exists or whether either party is entitled to a judgment as a matter of law.

*Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429, 436-37, 531 N.W.2d 606 (Ct. App. 1995) (citations omitted).

¶7 The Wisconsin Supreme Court has adopted the negligence standards articulated in RESTATEMENT (SECOND) OF TORTS § 324A (1965), “Liability to Third Person for Negligent Performance of Undertaking.” *Am. Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 48 Wis. 2d 305, 313, 179 N.W.2d 864 (1970); *Gritzner*, 2000 WI 68 at ¶56. The Restatement provides:

*One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm*

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<sup>4</sup> At the time of the circuit court decision, the supreme court had not decided *Gritzner v. Michael R.*, 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906, affirming, in part, this court’s decision in *Gritzner v. Michael R.*, 228 Wis. 2d 541, 598 N.W.2d 282 (Ct. App. 1999).

*resulting from his failure to exercise reasonable care to [perform]<sup>5</sup> his undertaking, if*

*(a) his failure to exercise reasonable care increases the risk of such harm, or*

*(b) he has undertaken to perform a duty owed by the other to the third person, or*

*(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.*

RESTATEMENT (SECOND) OF TORTS § 324A (1965) (emphases and footnote added.)

¶8 Kreuser does not dispute that, at least in theory, the words of the Restatement could encompass the allegations against him. After all, as he must concede, the amended complaint alleges that he “voluntarily assumed a duty” to render services to Devine under circumstances in which he knew or should have known that any failure to perform those services would create “an unreasonable risk of harm” to Devine and others. Kreuser argues, however, that “the liability of an adult charged with the care of a minor,” considered in *Gritzner*, cannot “be equated to the liability of an employee for another’s actions at an employer-sponsored Christmas party.” Further, Kreuser argues, any liability he otherwise might have for failing to drive Devine home is precluded by the immunity granted under WIS. STAT. § 125.035(2). We disagree.

¶9 First, although *Gritzner* did involve questions of an adult’s liability for his alleged negligent failure to warn others of a ten-year-old child’s “propensity to engage in inappropriate sexual acts” with other children, and for his alleged negligent failure to control the child’s conduct, *Gritzner*, 2000 WI 68 at

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<sup>5</sup> “The use of the word ‘protect’ in the introductory portion [of RESTATEMENT (SECOND) OF TORTS § 324A] apparently was a typographical error published in the Restatement and should read ‘perform.’” *Miller v. Bristol-Myers Co.*, 163 Wis. 2d 863, 883 n.7, 485 N.W.2d 31 (1992).

¶¶2, 7, the supreme court's discussion of the Restatement's "Liability to Third Person for Negligent Performance of Undertaking" is not limited to those facts. *Id.* at ¶56. Indeed, the supreme court emphasized that the Restatement's "standard of conduct applies to *anyone* 'who, having no duty to act, gratuitously undertakes to act and does so negligently.'" *Id.* (emphasis added) (quoting *Am. Mut. Liab. Ins. Co.*, 48 Wis.2d at 313, a case involving whether a boiler insurer had negligently performed boiler inspections). Thus, we conclude, the Restatement's standards do apply to Kreuser's liability to third persons for his alleged negligent failure to perform the undertaking he promised to render.

¶10 Second, we read nothing in WIS. STAT. § 125.035(2) to immunize Kreuser from his potential liability for negligent failure to perform the undertaking he allegedly promised.

¶11 The interpretation of WIS. STAT. § 125.035(2) presents a question of law, which we review *de novo*. *Greene*, 188 Wis. 2d at 370. WISCONSIN STAT. § 125.035(2) provides: "A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person." The statute is clear. As we explained, it "clearly and unambiguously immunizes persons from civil liability in circumstances ... where one adult furnishes another with alcohol." *Greene*, 188 Wis. 2d at 370. Here, Kreuser is not alleged to have furnished Devine with alcohol. Kreuser's liability does not rest on any allegation that he was, in the words of the statute, "procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to [Devine]." *See* WIS. STAT. § 125.035(2).

¶12 Kreuser contends, however, that if "procuring," under WIS. STAT. § 125.035(2), does not encompass his alleged conduct, an unreasonable result is

inevitable. He points out that bartenders and even drinking companions who encourage a person to get drunk and drive could be immune, *see Greene*, 188 Wis. 2d at 370-72, but a designated driver who fails to fulfill his responsibility could be liable. Thus, he maintains, rejection of his position “may utterly destroy budding designated driver programs in this state, because designated drivers may fear liability for inadequately performing or failing to perform their voluntary duty.”

¶13 We acknowledge that Kreuser may have identified a potentially ironic result flowing from the interplay of WIS. STAT. § 125.035(2) and the legal principles recognized by the Restatement. We must not, however, expand the statute beyond its clear and unambiguous scope as intended by the legislature which, we presume, was fully familiar with the well-established and long-standing principle that those who voluntarily assume a duty are liable if they breach that duty.

¶14 We see nothing in WIS. STAT. § 125.035(2) that would trump the applicability of the Restatement here and thus remove from the Restatement’s reach those who clearly fall within its scope. And, absent a legislative pronouncement requiring us to do so, we certainly will not relieve designated drivers, and others who volunteer to drive intoxicated individuals home, of liability for their failure to fulfill responsibilities they have assumed voluntarily.

*By the Court.*—Order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

RICKY D. STEPHENSON, Individually  
and as Personal Representative for the  
ESTATE OF KATHY M. STEPHENSON,

Plaintiffs,

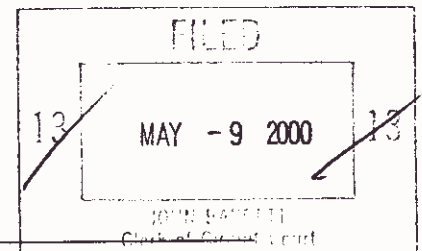
v.

UNIVERSAL METRICS, INC., JOHN H.  
KREUSER, AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY, THE OHIO  
CASUALTY INSURANCE COMPANY  
and ABC INSURANCE COMPANY,

Defendants.

Case No: 99-CV-004772

**RECEIVED**  
MAY 10 2000  
T. L. FOWELL, PETERSON & FRAUEN  
S.C.  
ATTORNEYS



**ORDER REGARDING MOTIONS FOR  
SUMMARY JUDGMENT AND DECLARATORY JUDGMENT**

This matter having come before the court on April 3, 2000, the Honorable Victor Manian presiding, on motions for summary judgment and declaratory judgment by Universal Metrics, Inc., West American Insurance Company, John H. Kreuser and Sentry Insurance A Mutual Company,

Karyn Gimbel Youso appearing on behalf of Universal Metrics, Inc.; Philip C. Reid appearing on behalf of West American Insurance Company; James M. Fredericks appearing on behalf of John H. Kreuser and Sentry Insurance A Mutual Company; Michael L. Bertling appearing on behalf of Ricky D. Stephenson, individually and as personal representative of the Estate of Kathy M. Stephenson; and David Andres appearing on behalf of American Family Mutual Insurance Company;

A112

And the court having reviewed the written submissions of all parties and having entertained comment by counsel on the record on April 3, 2000;

**IT IS HEREBY ORDERED** as follows:

1. Universal Metrics, Inc.'s motion for summary judgment is **granted** for the reasons stated by the court on the record.

2. West American Insurance Company's motion for summary and declaratory judgment is **granted** for the reasons stated by the court on the record.

3. John J. Kreuser and Sentry Insurance A Mutual Company's motion for summary judgment is **denied** for the reasons stated by the court on the record.

4. The current stay on discovery shall continue to May 26, 2000.

5. A status conference is set for June 15, 2000, at 1:30 p.m.

Dated at Milwaukee, Wisconsin, this 9<sup>th</sup> day of May, 2000.

BY THE COURT:

**/S/VICTOR MANIAN**

\_\_\_\_\_  
Honorable Victor Manian



STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

RICKY D. STEPHENSON, Individually and  
as the Personal Representative for the  
ESTATE OF KATHY M. STEPHENSON  
4881 North 106th Street  
Milwaukee, Wisconsin 53225

Plaintiffs,

v.

UNIVERSAL METRICS, INC.  
N60 W16590 Kohler Lane  
Menomonee Falls, Wisconsin 53052

JOHN H. KREUSER  
W161 N9060 Hayes Avenue  
Menomonee Falls, Wisconsin 53051

AMERICAN FAMILY MUTUAL INSURANCE COMPANY  
c/o James F. Eldridge  
6000 American Parkway  
Madison, Wisconsin 53783

WEST AMERICAN INSURANCE COMPANY  
c/o Brian L. Nielsen  
10923 North Sherwood Drive  
Mequon, Wisconsin 53092

SENTRY INSURANCE, a Mutual Company  
Post Office Box 8026  
Stevens Point, Wisconsin 54481

Defendants.

CASE NO. 99 CV 004772

Case Code: 30101  
Personal Injury - Auto

**RECEIVED**

OCT 21 1999

BURGELT, FOWELL, PETERSON & FRAUEN  
S.C.  
ATTORNEYS

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**AMENDED SUMMONS**

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THE STATE OF WISCONSIN

To each person named above as a defendant:

YOU ARE HEREBY NOTIFIED that the plaintiffs named above have filed a lawsuit or  
other legal action against you. The Complaint, which is attached, states the nature and basis of the

A114

legal action.

Within forty five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is:

Clerk of Circuit Court  
Milwaukee County Courthouse  
901 North Ninth Street  
Milwaukee, Wisconsin 53233

and to plaintiffs' attorney, whose address is:

Michael L. Bertling  
McLARIO, HELM & BERTLING, S.C.  
N88 W16783 Main Street  
Menomonee Falls, WI 53051

You may have an attorney help or represent you.

If you do not provide a proper answer within forty five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 19 day of October, 1999.

McLARIO, HELM & BERTLING, S.C.  
Attorneys for Plaintiff

BY:

  
Michael L. Bertling  
State Bar No. 01000095

**POST OFFICE ADDRESS**  
N88 W16783 Main Street  
Menomonee Falls, Wisconsin 53051  
(414) 251-4210

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

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RICKY D. STEPHENSON, Individually and  
as the Personal Representative for the  
ESTATE OF KATHY M. STEPHENSON  
4881 North 106th Street  
Milwaukee, Wisconsin 53225

Plaintiffs,

CASE NO. 99 CV 004772

v.

Case Code: 30101  
Personal Injury - Auto

UNIVERSAL METRICS, INC.  
N60 W16590 Kohler Lane  
Menomonee Falls, Wisconsin 53052

JOHN H. KREUSER  
W161 N9060 Hayes Avenue  
Menomonee Falls, Wisconsin 53051

AMERICAN FAMILY MUTUAL INSURANCE COMPANY  
c/o James F. Eldridge  
6000 American Parkway  
Madison, Wisconsin 53783

WEST AMERICAN INSURANCE COMPANY  
c/o Brian L. Nielsen  
10923 North Sherwood Drive  
Mequon, Wisconsin 53092

SENTRY INSURANCE, a Mutual Company  
Post Office Box 8026  
Stevens Point, Wisconsin 54481

Defendants.

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### COMPLAINT

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COMES NOW the plaintiffs, Ricky D. Stephenson, Individually and as the Personal Representative of the Estate of Kathy M. Stephenson, deceased, and the Estate of Kathy M. Stephenson, by it's Personal Representative, Ricky D. Stephenson, by their attorneys, McLario,

A116

Helm & Bertling, S.C., as and for a claim against the defendants, alleges and shows to the court as follows:

1. The plaintiff, Ricky D. Stephenson, individually and as the Personal Representative of the Estate of Kathy M. Stephenson, is an adult resident of the State of Wisconsin residing at 4881 North 106th Street, Milwaukee, Wisconsin 53225. Further, at all times relevant, Ricky D. Stephenson was the spouse of the deceased, Kathy M. Stephenson, and is the Personal Representative of the plaintiff, the Estate of Kathy M. Stephenson.

2. The plaintiff, the Estate of Kathy M. Stephenson, appears by its Personal Representative, Ricky D. Stephenson.

3. The defendant, Universal Metrics, Inc.(hereinafter referred to as UMI) is, upon information and belief, a corporation conducting business within the State of Wisconsin with offices located at N60 W16590 Kohler Lane, Menomonee Falls, Wisconsin 53052.

4. The defendant, John H. Kreuser is, upon information and belief, an adult resident of the State of Wisconsin residing at W161 N9060 Hayes Avenue, Menomonee Falls, Wisconsin 53051.

5. The defendant, American Family Mutual Insurance Company is, upon information and belief, an insurance corporation conducting business within the State of Wisconsin with offices located at 6000 American Parkway, Madison, Wisconsin 53783. Further, at all times relevant, American Family Mutual Insurance Company had in force and effect a policy of insurance providing liability coverage to Michael T. Devine, deceased, for the claims of the plaintiffs set forth herein.

6. At all times relevant, American Family Mutual Insurance Company had in force and effect a policy of insurance providing underinsured motorist coverage to the deceased, Kathy M. Stephenson, so that American Family Mutual Insurance Company is liable to the plaintiffs to the

extent of said coverage.

7. The defendant, West American Insurance Company, is, upon information and belief, an insurance corporation conducting business within the State of Wisconsin, with offices located at 10923 North Sherwood Drive, Mequon, Wisconsin 53092. Further, at all times relevant, West American Insurance Company had in force and effect a policy of insurance providing liability coverage to Universal Metrics, Inc., and/or its employees, including, but not limited to, the defendant, John H. Kreuser, for the claims of the plaintiffs set forth herein.

8. The defendant, Sentry Insurance, a mutual company is, upon information and belief, an insurance corporation conducting business within the State of Wisconsin with offices located at Post Office Box 8026, Stevens Point, Wisconsin 54481. Further, at all times relevant, Sentry Insurance, a mutual company, had in force and effect a policy of insurance providing liability coverage to the defendant, John H. Kreuser, for the claims of the plaintiff set forth herein.

9. On December 4, 1998, a vehicle being driven by Michael T. Devine, deceased, was traveling eastbound on Silver Spring Road/County Trunk Highway VV.

10. On December 4, 1998, a vehicle being driven by Kathy M. Stephenson, deceased, was traveling westbound on Silver Spring Road/Country Trunk Highway VV.

11. On said highway, east of Marcy Road, the vehicle being operated by Michael T. Devine deviated over the center line into the westbound lane so as to collide with the motor vehicle being operated by Kathy M. Stephenson.

12. The collision referred to herein is a substantial and proximate cause of Kathy M. Stephenson suffering personal injury and death.

#### **FIRST CAUSE OF ACTION**

13. Reallege and incorporate paragraphs 1 through 12 as if set forth fully hereafter.

14. Michael T. Devine, deceased, was negligent in the operation of his motor vehicle on December 4, 1998, so as to collide with a motor vehicle being operated by Kathy M. Stephenson.

15. The negligence of Michael T. Devine was a substantial and proximate cause of personal injury and wrongful death to the deceased, Kathy M. Stephenson.

### **SECOND CAUSE OF ACTION**

16. Reallege and incorporate paragraphs 1 through 15 as if set forth fully hereafter.

17. At all times relevant, the defendant, Michael T. Devine, deceased, was the operator of an underinsured motor vehicle as that term is defined within the American Family Mutual Insurance Company policy, so that said defendant is liable to the plaintiffs for the damages referred to herein, pursuant to its underinsured motorist coverage.

### **THIRD CAUSE OF ACTION**

18. Reallege and incorporate paragraphs 1 through 15 as if fully set forth hereafter.

19. Just prior to the accident referred to herein, UMI held a meeting at the Silver Spring Country Club which was attended by its employees.

20. The employees of UMI were expressly or impliedly required to attend the meeting.

21. The meeting was held to further the business interests of UMI by way of creating good will between it and its employees, and for purposes of increasing employee morale, all to the benefit of UMI.

22. UMI, by its agents and employees, had the right to control and, did exercise control of the conduct of those attending the meeting.

23. The deceased, Michael T. Devine, was within the scope of his employment with UMI when attending the meeting referred to herein.

24. UMI, through its agents and employees, had the right to control and, did exercise

control over the consumption of alcoholic beverages of those attending the meeting, including but not limited to, the deceased, Michael T. Devine.

25. Michael T. Devine, while at the meeting, consumed alcoholic beverages to the point that he became impaired, with said impairment being a substantial and proximate cause of his inability to control his motor vehicle.

26. The impairment of Michael T. Devine, as referred to herein, was a substantial and proximate cause of the collision referred to herein.

27. The deceased, Michael T. Devine, was negligent in the consumption of alcoholic beverages to the point of impairment when he knew or should have known that he would be operating a motor vehicle, and such negligence was a substantial and proximate cause of the collision referred to herein.

28. The defendant, UMI, is liable for the wrongful conduct of Michael T. Devine, as the employer of Michael T. Devine, in that he consumed said alcoholic beverages while in the scope of his employment at the UMI meeting.

#### **FOURTH CAUSE OF ACTION**

29. Reallege and incorporate paragraphs 1 through 15 and paragraphs 18 through 28 as if set forth fully hereafter.

30. UMI, through its management agent/employee, defendant, John H. Kreuser, voluntarily assumed a duty to see that the deceased, Michael T. Devine, would not travel within his motor vehicle from the meeting referred to herein in an impaired condition.

31. UMI, through its agent/employee, John H. Kreuser, notified personnel at the Silver Spring Country Club that the decedent, Michael T. Devine, could continue to consume alcoholic beverages and that UMI, through its agents/employees, would prevent Michael T. Devine from

operating a motor vehicle from the meeting referred to herein, in that he would be given a ride home so as to pose no threat to himself or other users of the highway.

32. Upon the UMI representation referred to herein regarding travel arrangements for Michael T. Devine, Michael T. Devine was allowed by Silver Spring Country Club personnel to continue to consume alcoholic beverages to the point that he became impaired.

33. UMI's voluntary assumption of the duty to see that Michael T. Devine did not operate a motor vehicle in an impaired state, created a special relationship and/or special circumstance whereby UMI, through its agents and employees, had a duty to control the conduct of Michael T. Devine regarding the operation of a motor vehicle in an impaired state in that UMI knew, or should have known, that breach of said duty would create an unreasonable risk of harm to Michael T. Devine, and other users of the highway should Michael T. Devine be allowed to operate a motor vehicle from said meeting in an impaired condition.

34. UMI, through its agents/employees, failed to exercise ordinary care in taking reasonable precautions to see that the decedent, Michael T. Devine, did not operate a motor vehicle upon the highway while traveling from the meeting referred to herein.

35. UMI, through its agents/employees, did not give Michael T. Devine a ride from the meeting referred to herein, did not inform Silver Spring Country Club personnel that a ride would not be given to Michael T. Devine, so that he would not be allowed to consume additional alcoholic beverages and, further, did not notify Michael T. Devine that he would not be given a ride home, so that Michael T. Devine could refrain from drinking additional alcoholic beverages, thereby increasing his impaired condition.

36. UMI, through its agent/employees, breached its duty to control the conduct of Michael T. Devine, regarding his operation of a motor vehicle in an impaired state from the meeting



referred to herein, with said breach being a substantial and proximate cause of the collision referred to herein.

37. UMI, through its agents/employees, were negligent in failing to control the conduct of Michael T. Devine, with respect to driving impaired from the meeting referred to herein, with said negligence being a substantial and proximate cause of personal injury and wrongful death to Kathy M. Stephenson, thereby causing damages to the plaintiffs as described herein.

#### **FIFTH CAUSE OF ACTION**

38. Reallege and incorporate paragraphs 1 through 15 as if fully set forth hereafter.

39. The defendant, John H. Kreuser, voluntarily assumed a duty to drive the deceased, Michael T. Devine, home from the gathering referred to herein, so that he would not operate a motor vehicle upon the roadway in an impaired state.

40. The defendant, John H. Kreuser, assumed said duty by notifying Silver Spring Country Club personnel that Michael T. Devine could continue to consume alcoholic beverages without concern for operating a motor vehicle upon the roadway in an impaired state in that he would see that he did not operate a motor vehicle in said condition and would drive him safely home.

41. Upon the assurance of John H. Kreuser that Michael T. Devine could continue to drink to the point of, and beyond, impairment without concern for operating a motor vehicle upon the highways, Silver Spring Country Club personnel continued to serve alcoholic beverages to Michael T. Devine.

42. The continued consumption of alcoholic beverages after said assurance, led to the impairment of Michael T. Devine's ability to operate a motor vehicle.

43. Through his conduct and assurance, the defendant, John H. Kreuser, created a special relationship and/or circumstance between he and Michael T. Devine whereby said defendant had a

duty to exercise ordinary care in taking reasonable precautions to prevent Michael T. Devine from driving from the meeting referred to herein in an impaired state.

44. The defendant, John H. Kreuser, breached said duty in that he failed to exercise ordinary care in taking reasonable precautions to prevent Michael T. Devine from operating his motor vehicle in an impaired state in that he took no steps to see that Michael T. Devine did not leave the meeting within his motor vehicle in an impaired state, did not notify the Silver Spring Country Club personnel that his mind had changed and he would not give a ride to Michael T. Devine, nor, did he notify Michael T. Devine that he had changed his mind and would not give a ride to Michael T. Devine, all which led to the continued consumption of alcoholic beverages, thereby causing impairment to Michael T. Devine's ability to operate a motor vehicle.

45. The defendant, John H. Kreuser, was negligent with respect to the breach of said duty, with said negligence being a substantial and proximate cause of Michael T. Devine operating a vehicle upon the roadway in an impaired state, causing the collision referred to herein.

46. The negligence of the defendant, John H. Kreuser, was a substantial and proximate cause of the personal injury and wrongful death of Kathy M. Stephenson, thereby causing damage to the plaintiffs herein.

#### **SIXTH CAUSE OF ACTION**

47. Reallege and incorporation paragraphs 1 through 15 and 18 through 37, as if set fully hereafter.

48. UMI, through its agents/employees, had a duty to properly supervise the conduct of its employees at the meeting referred to herein so that said employees would not create unreasonable risk of harm to themselves and other operators on the highway as they left the meeting referred to herein.

49. The defendant, UMI, through its agents/employees were negligent in failing to properly supervise it's employee, Michael T. Devine, insofar as allowing him to operate his motor vehicle from the employee meeting referred to herein, after he had consumed alcohol to such a level of impairment that UMI knew or should have known that he created an unreasonable risk of harm to himself and users of the highway.

50. The negligence of UMI as described herein, is a substantial and proximate cause of the collision referred to herein and, the personal injury and wrongful death of Kathy M. Stephenson, thereby causing damage to the plaintiffs as set forth herein.

#### **SEVENTH CAUSE OF ACTION**

51. Reallege and incorporate paragraphs 1 through 15, 18 through 37 and 47 through 50, as if set forth fully hereafter.

52. By virtue of the conduct of UMI with respect to the meeting referred to herein, UMI controlled the method of travel from the meeting referred to herein in that UMI, through its agents/employees, had the right to and did control the degree of alcohol consumed by those at the meeting.

53. In that UMI, through its agents/employees had the right to and did control the degree of alcohol consumed by those at the meeting, it controlled the method of travel from the meeting referred to herein in that the method of operation of a motor vehicle upon the roadways was effected by the level of impairment caused by the consumption of alcoholic beverages.

54. In that UMI, through its agents/employees controlled the method of travel from the meeting referred to herein, UMI is liable for the negligent operation of the Michael T. Devine vehicle with such negligence causing personal injury and the wrongful death of Kathy M. Stephenson,

thereby causing damages to the plaintiffs as described herein.

#### **EIGHTH CAUSE OF ACTION**

55. Reallege and incorporate paragraphs 1 through 54 as if set forth fully hereafter.

56. The plaintiff, the Estate of Kathy M. Stephenson, has suffered pecuniary damage, medical and funeral expense as a result of the personal injury and wrongful death referred to herein.

57. The plaintiff, the Estate of Kathy M. Stephenson, has suffered damages to the extent of any conscious pain and suffering incurred by Kathy M. Stephenson as a result of the personal injury and wrongful death referred to herein.

58. The plaintiff, Ricky D. Stephenson, has been damaged due to the loss of his society and companionship of his wife, Kathy M. Stephenson, as a result of the personal injury and wrongful death referred to herein.

59. The defendants are liable to the plaintiffs for the damages referred to herein.

WHEREFORE, the plaintiff demands judgment against the defendants in accordance with the demands of this Complaint, plus costs and disbursements incurred herein.

Dated this 19 day of October, 1999.

#### **A 12-PERSON JURY IS HEREBY DEMANDED**

McLARIO, HELM & BERTLING, S.C.  
Attorneys for Plaintiff

By:



Michael L. Bertling  
State Bar No. 01000095

**POST OFFICE ADDRESS:**  
N88 W16783 Main Street  
Menomonee Falls, Wisconsin 53051  
414/251-4210

Date Aug 12  
EXHIBIT A1



UNIVERSAL METRICS, INC.  
MENOMONEE FALLS, WI 53051

MEMO

DATE: September 22, 1998

TO: ALL EMPLOYEES

WHAT: UMI CHRISTMAS PARTY

WHEN: FRIDAY DEC. 4, 1998

TIME: 6:00 PM

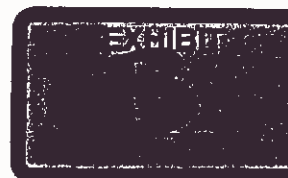
WHERE: SILVER SPRING COUNTRY CLUB  
N56 W21318 SILVER SPRING DRIVE  
MENOMONEE FALLS, WI 53051  
IN THE TREMONT A ROOM

To all employees, keep the date of Friday Dec. 4, 1998 open for the UMI Christmas party. A good time is always had by all. Come and enjoy a pleasant social time with your fellow workers. Expect good food and an enjoyable time. Wives, Husband's and guest are welcome.

More information will be coming as to the choice of food.

The UMI Staff is looking forward to share this evening with you.

UMI Staff



A127 EXHIBIT A2



DATE: NOV. 6, 1998  
TO: ALL EMPLOYEES  
WHAT: UMI CHRISTMAS PARTY  
WHEN: FRIDAY DEC. 4, 1998  
TIME: COCKTAILS 6:00 PM DINNER AT 7:00 PM  
WHERE: SILVER SPRING COUNTRY CLUB  
N56 W21318 SILVER SPRING DRIVE  
MENOMONEE FALLS, WI 53051

The Christmas party this year is at the Silver Spring Country Club. Cocktails will start at 6:00 PM with the first two drinks per person as compliments of UMI. Seating for dinner will be at 7:00 PM. We will be in the TREMONT A room.

**THE SELECTION ARE AS FOLLOWS:**

**BREAST OF CHICKEN SILVER SPRING STYLE:**

(Boneless breast of Chicken filled with Asparagus tips, bacon, cheddar and cream cheese and onion lightly breaded and baked to a golden brown)

**FILLET OF ORANGE ROUGHY:**

(Fresh, boneless fish fillet baked to perfection, topped with lemon butter)

**ROAST PRIME RIB OF BEEF:**

( Slow Roasted prime beef-served with natural juices)

**DINNER INCLUDES:**

Oven Roasted Potatoes, Mixed Vegetables, Mixed Garden Salad, Assorted Rolls, Butter and Coffee, Teas, or Milk.

PLEASE RETURN TO BEVERLY  
BY NOV. 20, 1998

DETACH HERE AND RETURN

I PLAN TO ATTEND:

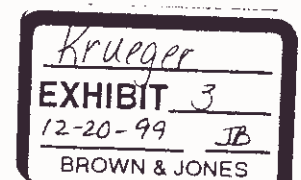
I AM UNABLE TO ATTEND

EMPLOYEE NAME:

EMPLOYEE SELECTION:

GUEST NAME:

GUEST SELECTION:



A128 EXHIBIT A

IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

STATE OF WISCONSIN

-----

RICKY D. STEPHENSON, Individually  
and as Personal Representative for  
the ESTATE OF KATHY M. STEPHENSON,

Plaintiff,

-vs-

Case No. 99-CV-004772  
Code No. 30101

UNIVERSAL METRICS, INCORPORATED,  
JOHN H. KREUSER, AMERICAN FAMILY  
MUTUAL INSURANCE COMPANY, WEST  
AMERICA INSURANCE COMPANY and ABC  
INSURANCE COMPANY,

Defendants.

-----

**COPY**

Examination of JOHN H. KREUSER, taken at  
the instance of the Plaintiff, under and pursuant to  
Section 804.05 of the Wisconsin Statutes, pursuant to  
Stipulation, before JILL A. BLESKEY, Registered  
Professional Reporter and Notary Public in and for the  
State of Wisconsin, at Borgelt, Powell, Peterson &  
Frauen, S.C., 735 North Water Street, Fifteenth Floor,  
Milwaukee, Wisconsin, on the 20th day of December, 1999,  
commencing at 12:09 p.m. and concluding at 1:13 p.m.



A P P E A R A N C E S		Page 2
1		
2	McLARIO, HELM & BERTLING, S.C., by	
3	MR. MICHAEL L. BERTLING,	
4	888 W16783 Main Street,	
	Menomonee Falls, Wisconsin 53051,	
	appeared on behalf of the Plaintiff.	
5	BORGELT, POWELL, PETERSON & FRAUEN, S.C., by	
6	MR. JAMES M. FREDERICKS,	
7	735 North Water Street, Fifteenth Floor,	
8	Milwaukee, Wisconsin 53202-4188,	
	appeared on behalf of the Defendant	
	John H. Kreuser.	
9	LAW OFFICES OF MINGO & YANKALA, S.C., by	
10	MR. MARK J. MINGO,	
11	Loyalty Building, Suite 210,	
	611 North Broadway,	
	Milwaukee, Wisconsin 53202-5004,	
	appeared on behalf of the Defendant	
	Universal Metrics, Incorporated.	
12	COOK & FRANKZ, S.C., by	
13	MR. PHILIP C. REID,	
14	660 West Mason Street,	
	Milwaukee, Wisconsin 53202-3877,	
	appeared on behalf of the Defendant	
	West America Insurance Company.	
15	PETERSON, JOHNSON & MURRAY, S.C., by	
16	MR. DAVID F. ANDRES,	
17	733 North Van Buren Street, Sixth Floor,	
18	Milwaukee, Wisconsin 53202,	
	appeared on behalf of the Defendant	
	American Family Mutual Insurance Company.	
19		
20		
	* * * * *	
	I N D E X	
21	Examination By:	Page
22	Mr. Bertling .....	3
23	Mr. Mingo .....	54
	Mr. Reid .....	55
	Mr. Fredericks .....	56
24	Exhibits: (None) Marked ID	
25	Requests: (None) Page	

Page 3

1 JOHN H. KREUSER, called as a witness

2 herein, having been first duly sworn on oath, was

3 examined and testified as follows:

4 EXAMINATION

5 BY MR. BERTLING:

6 Q Could you please tell me your name?

7 A John Kreuser.

8 Q And where are you employed?

9 A At Universal Metrics, Incorporated.

10 Q And where do you reside?

11 A My home?

12 Q Yeah.

13 A Slinger, Wisconsin.

14 Q And your wife's name?

15 A Debra.

16 Q And how long have you been married to Debra?

17 A Twenty-nine years.

18 Q Now, you were present in this room when I asked

19 some questions of Stanley Krueger, correct?

20 A Yes.

21 Q You were present during his deposition, correct?

22 A Yes.

23 Q And so I'm going to just move ahead a little bit as

24 quick as I can to just establish some basic facts

25 and I guess the first one is you are currently a

Page 4

1 department head at UMI?

2 A Yes.

3 Q And you are head of the engineering department?

4 A I'm head of engineering and quality assurance.

5 Q And how long have you been the head of that

6 department, approximately?

7 A I believe it's two years.

8 Q Prior to that were you employed by UMI?

9 A Yes.

10 Q In what capacity?

11 A I was in charge of account sales.

12 Q And how long were you in charge of account sales?

13 A I believe that was three years.

14 Q Prior to that were you employed by UMI?

15 A Yes.

16 Q Okay. Tell me about that.

17 A I was -- a year prior to that I had been an outside

18 salesperson.

19 Q Stanley Krueger testified, and I'm sure you heard

20 him, that you kind of came and went a couple of

21 times from UMI; is that an accurate statement?

22 A I had left there in 1988, I believe it was, and I

23 came back in '92.

24 Q Totally how many years have you worked at UMI?

25 MR. FREDERICKS: Or its predecessors?

Page 5

1 MR. BERTLING: Yeah.

2 THE WITNESS: I'm guessing nine and a

3 half, ten years total.

4 (Discussion off the record.)

5 BY MR. BERTLING:

6 Q You've heard Mr. Stanley characterize department

7 heads as part of the UMI staff?

8 A Yes.

9 Q And you would agree with that characterization?

10 A Pretty much, yes.

11 Q During your entire tenure at UMI do you ever recall

12 a Christmas season going by where UMI did not have

13 a Christmas party?

14 A Yes, I think there were a couple years where we did

15 not.

16 Q Okay. Do you recall when that would have been?

17 A No.

18 Q How about in the last five years prior to 1998,

19 were there always Christmas parties?

20 A I really don't recall. I'm trying to think of

21 where we held them, you know, that's what I'm

22 trying to relate to the years. My memory's good

23 but it's short.

24 Q As a member of the staff, department head, what did

25 you believe the purpose of the UMI Christmas party

Page 6

1 to be?

2 MR. MINGO: I'll object on the basis of

3 foundation.

4 THE WITNESS: Just a get together at that

5 time of the year.

6 BY MR. BERTLING:

7 Q You've heard Stanley Krueger characterize it as an

8 event where appreciation can be shown to the

9 employees?

10 A I believe I agree with that.

11 Q Would you agree that it's a way to reward the

12 employees for work performed over the prior year?

13 MR. MINGO: Same objection. Go ahead.

14 THE WITNESS: I really don't think that

15 it was a reward. Recognition.

16 BY MR. BERTLING:

17 Q Recognition for what?

18 A For service, years of service.

19 Q Was it customary at these parties that you

20 attended, that you can recall, to give out awards,

21 years of service awards, those types of things?

22 MR. FREDERICKS: At the Christmas

23 parties?

24 MR. BERTLING: Yeah. That's what I

25 meant.

Page 7

1 THE WITNESS: I had seen it on prior

2 parties, you know, occasions so, yeah, I guess you

3 could say it was customary.

4 BY MR. BERTLING:

5 Q And these awards, as described by Mr. Krueger,

6 would be years of service awards; is that your

7 recollection or did they include other things from

8 time to time?

9 A Strictly for years of service; five, ten, fifteen

10 years.

11 Q And Mr. Krueger would give a speech at these

12 parties?

13 A A short speech, correct.

14 Q As a department head at these parties would you

15 make an effort to talk with the employees, mingle

16 with the employees?

17 A Not really.

18 Q Was there ever discussions prior to any of these

19 parties where Mr. Krueger or either of the vice

20 presidents indicated to you, as a department head,

21 he'd like to see you talk with people and socialize

22 with the employees at these parties?

23 A No.

24 Q You heard Mr. Krueger testify that he would try to

25 go to each table after dinner and converse with the

Page 8

1 employees, you heard him testify about that?

2 A Yes, I heard that.

3 Q Did you try and do anything similar to that at the

4 party of December 4th of 1998?

5 A No.

6 Q How about at any prior party?

7 A No.

8 Q Was there any member of management or the staff not

9 present at this December 4th of 1998 party?

10 A Not that I recall.

11 Q How did you first become aware of the party being

12 set for December 4th of '98? How does that

13 typically happen?

14 A It was probably brought up at a staff meeting and

15 then posted on the board, bulletin board.

16 Q Is this staff meeting that you're referring to the

17 one that occurs regularly on Monday morning?

18 A We have a staff meeting on Mondays, Wednesdays and

19 Fridays.

20 Q Okay. And so first the staff would discuss the

21 fact that this party tentatively was being

22 scheduled for December 4th, in this case, 1998 and

23 then if that's acceptable it would be posted?

24 A I don't believe that it was a question of it being

25 acceptable, I think it was a question of being an

Page 9

1 available date at the country club.

2 Q Okay. The booking contract that I've marked as an

3 exhibit, and I'm just going to tell you this,

4 bears a date of January of 1998, many months before

5 the party. Are you aware of the date of the party

6 as it's booked, when it's booked? Do you

7 understand my question?

8 MR. FREDERICKS: I don't.

9 MR. BERTLING: That's a bad question.

10 BY MR. BERTLING:

11 Q Back when the room was booked in January of 1998,

12 were you aware at that time that it was booked for

13 December 4th?

14 A I really don't recall. I don't recall it being

15 booked in January.

16 Q Okay. So the first you recall of being notified of

17 this event being held would have been during a

18 staff meeting?

19 A Correct.

20 Q And then after the staff meeting notice is posted

21 for the employees?

22 A Correct.

23 Q Do you ever recall attending a Christmas party

24 where the president, the vice president and the

25 department heads were not present at that party?

1 A There may have been one or the other missing, I  
2 couldn't say specifically.  
3 Q So you're saying it may have occurred but you don't  
4 recall it occurring?  
5 A Right.  
6 Q It's my understanding, and I'll just touch on this  
7 briefly, but the food and the room and the staff  
8 and the two drink tickets were paid for by UMI,  
9 correct?  
10 A Correct.  
11 Q There was a bar in the Tremont Room where the party  
12 was held, correct?  
13 A Yes.  
14 Q And this bar would accept the tickets and would  
15 also accept cash for drinks and alcohol?  
16 A I'm not sure about the cash thing but I know it  
17 would accept tickets, that's all I had used.  
18 Q Okay. Is it your testimony then you don't know if  
19 the bar inside the Tremont Room would serve drinks  
20 and beer and other alcoholic beverages in exchange  
21 for cash? Was it a cash bar?  
22 A I'm saying that I do not know if it was a cash bar  
23 because I did not experience exchanging cash at  
24 that bar.  
25 Q Did you see anybody else buying drinks with cash

1 that evening on December 4th of 1998?  
2 A I truly don't recall.  
3 Q Did anybody ask you to buy a drink for them that  
4 evening? Buy a drink for them at that bar?  
5 A Yes, on one occasion.  
6 Q All right. The documents that we've marked as  
7 exhibits in the prior deposition indicate that each  
8 attendee was to get two beverage tickets, correct?  
9 A Yes.  
10 Q We also have testimony that Stanley Krueger  
11 received eight tickets, you heard him testify to  
12 that?  
13 A Yes.  
14 Q Did you receive any more than two?  
15 A No, I did not.  
16 Q And your wife was with you that evening?  
17 A Yes. I received two tickets for her and two for  
18 myself so a total of four.  
19 Q Do you know if anybody else on this staff received  
20 more than their two tickets, --  
21 A No, I do not.  
22 Q -- similar to Mr. Krueger?  
23 A No, I do not.  
24 Q Okay. When -- upon arriving at the Christmas party  
25 on December 4th of 1998 was there a table at the

1 doorway that was being manned by Beverly  
2 Butterfield and her husband, Robert?  
3 A There had been a table there and they were standing  
4 next to it, so.  
5 Q Okay. And were there name tags on the table for  
6 the attendees?  
7 A I know there were tags there, I don't know whether  
8 they were filled out as we came or if they were  
9 filled out ahead of time but we had the  
10 stick-'em-on type.  
11 Q And there's where I was going with that. You don't  
12 recall whether they were filled out prior or  
13 whether you filled them out?  
14 A No, I don't know. I really don't.  
15 Q So if I understand things correctly, when you  
16 arrived there with your wife you'd go to the table  
17 and Beverly would check you in, if you will?  
18 A If you want to call it that I guess.  
19 Q Did you sign anything, a guest book?  
20 A No.  
21 Q Did your wife sign a guest book?  
22 A No.  
23 Q Was there a guest book?  
24 A I did not see one.  
25 Q Did Beverly Butterfield have a list of people who

1 would be coming that evening?  
2 A I did not see such a list. Perhaps she did.  
3 Q It's my understanding then, from what you've  
4 testified, you would get a name tag, correct?  
5 A Yes.  
6 Q Your wife would get a name tag?  
7 A Yes.  
8 Q And you would also get two drink tickets each?  
9 A Yes.  
10 Q Did you get -- go ahead. You were going to say  
11 something.  
12 A Actually I received all four tickets.  
13 Q Well, I got you. And did you receive a name place  
14 or a place name or a place marker or something like  
15 that at that table to use to reserve your seat?  
16 A We had a menu item, I believe, what was on a card  
17 and basically you could place it at a table of your  
18 choice.  
19 Q All right. So you took your menu -- strike that.  
20 So you took the food item that you reserved and put  
21 that by the seat you wanted to sit at, at the table  
22 you wanted to sit at?  
23 A Correct.  
24 Q Can you tell me who sat with Stanley Krueger that  
25 evening at his table?

Page 14

Page 16

1 A No.  
2 Q Do you recall who sat at your table?  
3 A Yes.  
4 Q Can you tell me who you can recall?  
5 A Ken Fergus and his wife, Al Toth and his wife, I  
6 guess that's the only people I recall. There had  
7 been two more though, I believe.  
8 Q Other than Mr. Krueger inviting a social, business  
9 friend that he testified to to the party, who was  
10 not an employee of UMI, were there any other  
11 individuals there who were not either employees of  
12 UMI or employees' guests? Do you understand my  
13 question?  
14 A Yes.  
15 Q Okay.  
16 A I do not recall anyone else being there.  
17 Q Okay. Were you the supervisor of Mike Divine?  
18 A No.  
19 Q He was not in your department?  
20 A No.  
21 Q Okay. How long have you known Mike Divine?  
22 A I'd have to say probably fifteen years.  
23 Q Did you know him at other places of employment?  
24 A Yes.  
25 Q And what place would that have been?

1 Q Did you socialize with him at all?  
2 A On a rare occasion.  
3 Q Okay. And what would that occasion be?  
4 A He'd help me work. Like, as an occasion, we built  
5 a deck. I would -- outside of work. That was  
6 about the extent of the contact.  
7 Q But you wouldn't see him on a regular basis  
8 socially?  
9 A No.  
10 Q As I understand your previous testimony, you don't  
11 recall ever going to lunch with him where he was  
12 drinking beer while working at UMI?  
13 A Could you --  
14 Q Sure. Do you ever recall going to lunch with him  
15 while he was working at UMI where he drank beer  
16 during lunch?  
17 A No.  
18 Q Drank any alcohol during lunch?  
19 A No.  
20 Q Okay. Your brother is Al Kreuser?  
21 A Correct.  
22 Q Are you aware of Al giving rides to Mike Divine  
23 when he first began working for UMI?  
24 A Yes, I was aware of that.  
25 Q He would give a ride to Mike Divine both to and

Page 15

Page 17

1 A Arcron.  
2 Q Anywhere else, any other place of employment?  
3 A No.  
4 Q Did you meet him through your employment at --  
5 A Yes.  
6 Q At that prior place?  
7 A Correct.  
8 Q Prior to December 4th of 1998 did you consider Mike  
9 Divine to have a problem with drinking alcohol  
10 where he would drink to excess?  
11 A It's a tough call. I had seen him intoxicated on  
12 several occasions but I did not believe that he was  
13 an "alcoholic."  
14 Q So you did not come to the conclusion, from what  
15 you saw, that he was an alcoholic as you would  
16 define that?  
17 A Yes.  
18 Q But you've seen him intoxicated on prior occasions?  
19 A Once or twice.  
20 Q Did you ever know him to go out and drink at lunch  
21 while on the job at UMI?  
22 A I have no first-hand knowledge of that, no.  
23 Q Did you ever go out to DJ's and have a beer with  
24 him at lunch?  
25 A No.

1 from work?  
2 A Yes. They lived, like, I guess within a block of  
3 each other.  
4 Q Back when that was occurring, and I think we have  
5 testimony from Mr. Krueger that that occurred in  
6 1990 or 1991, does that sound right to you?  
7 A Yes.  
8 Q Back at that time was Al, your brother, a member of  
9 the UMI staff?  
10 A I believe I can't answer that. I was not employed  
11 at UMI in that period.  
12 Q He is currently a vice president; is that correct?  
13 A Currently, yes.  
14 Q Do you know how long he's been a vice president?  
15 A My guess would be two years.  
16 Q Prior to that do you know what he did at UMI, what  
17 his position was?  
18 A I believe his title had been manager of  
19 manufacturing.  
20 Q And do you know how long he was a manager of  
21 manufacturing?  
22 A No, I do not.  
23 Q But you are aware that your brother gave rides to  
24 Mike Divine both to and from work for a period of  
25 time, correct?



Page 18

1 A Correct.  
2 Q And the reason he was giving rides to Mike Divine  
3 was what, as you understood it to be?  
4 A He didn't have a driver's license.  
5 Q Did you know why?  
6 A No, I did not.  
7 Q Did your brother, Al, as far as you know?  
8 MR. FREDERICKS: Foundation. Wants to  
9 know if you knew what your brother was thinking or  
10 knew, if you know.  
11 BY MR. BERTLING:  
12 Q Did he know, yeah. And if you say yes I'll try to  
13 follow up and find out why you think that.  
14 A I would believe my brother knew why, yes.  
15 Q And why do you say that?  
16 A 'Cause he worked for him.  
17 Q Did your brother ever tell you at any time up until  
18 the present time that he knew the reason why Mike  
19 did not have a driver's license was because he had  
20 it suspended or revoked due to a driving while  
21 intoxicated?  
22 A No.  
23 Q Is it your understanding that that is why Mike did  
24 not have a license at that time?  
25 MR. FREDERICKS: His understanding back

Page 19

1 then or his understanding now?  
2 MR. BERTLING: No, now. Now, now, now.  
3 MR. FREDERICKS: All right.  
4 BY MR. BERTLING:  
5 Q Currently is it your understanding that that's why  
6 Mike did not have a license was because of the fact  
7 that he had them suspended or revoked due to an  
8 operating while intoxicated?  
9 A Yes, now. Yes.  
10 Q When did you become aware of that? Or how did you  
11 become aware of that, either way?  
12 A I believe probably in a conversation with Mike  
13 Divine after that.  
14 Q So that would have been a conversation with Mike  
15 Divine before the December 4th of 1998 party,  
16 correct?  
17 A Correct.  
18 Q Prior to the December 4th of 1998 party were you  
19 aware of Mike Divine being involved in a motorcycle  
20 accident?  
21 A Yes.  
22 Q Did you understand that to involve alcohol?  
23 A I never really -- never really questioned it.  
24 Q Did you understand it to include alcohol?  
25 A No.

Page 20

1 Q Did Mike Divine ever tell you the circumstances of  
2 the accident, how it happened?  
3 A Not at all.  
4 Q As you sit here today, from whatever source, have  
5 you learned whether or not the motorcycle accident  
6 involved alcohol?  
7 A No.  
8 Q When did that motorcycle accident occur, as best  
9 you can recall?  
10 A My guess would be '96.  
11 Q At that time you were working for UMI?  
12 A Yes.  
13 Q And at that time were you an account manager?  
14 A Yes.  
15 Q Do you have -- strike that. While working for UMI  
16 did you ever come across any information that  
17 indicated to you that Mike would drink alcohol  
18 during working hours?  
19 A No.  
20 Q Did you ever come across any information that Mike  
21 would drink beer at lunch?  
22 A No.  
23 Q Are you aware of any time prior to December 4th of  
24 1998 where Mike became intoxicated at a company  
25 function?

Page 21

1 A There had been a previous Christmas party where he  
2 had -- he fell asleep at the bar and I gave him a  
3 ride home.  
4 Q And which Christmas party was that?  
5 A My guess would be '95, perhaps.  
6 Q Do you know where that was held?  
7 A That was at Silver Spring.  
8 Q Was it the Tremont Room or a different room?  
9 A No, it was a different room.  
10 Q And you say he fell asleep at the bar --  
11 A It was the main bar.  
12 Q Okay. You answered my question. But it would have  
13 been the main bar at the country club, not a bar  
14 that might have been set up in the room where the  
15 UMI party was; is that accurate?  
16 A Yes.  
17 Q And I'm trying to picture this. Are you telling me  
18 that it was a situation where Mike was face down on  
19 the bar asleep?  
20 A Yes.  
21 Q Any other occasions at any other functions where  
22 Mike Divine drank to excess, other than that one,  
23 prior to December 4th of '98?  
24 A No.  
25 Q How is it that you discovered him asleep at the bar

Page 22

Page 24

1 in 1995 at the Christmas party?  
 2 A Well, I mean, most of the people from the room had  
 3 been out in the main bar at that point.  
 4 Q Did that Christmas party have a bar in its room as  
 5 well or not?  
 6 A Yes.  
 7 Q So it had the similar setup that we have in 1998  
 8 where there was a bar in the room?  
 9 A Yes.  
 10 Q What was the reason for some people moving from the  
 11 room then to the main bar? Had the room closed  
 12 down by that point?  
 13 A I believe this was after dinner and basically most  
 14 of the functions that were going -- happened in the  
 15 room were over with.  
 16 Q All right. So the party was kind of breaking up at  
 17 that point?  
 18 A Right.  
 19 Q And so if I'm -- I'm just trying to picture this.  
 20 What you're telling me is some UMI employees moved  
 21 from the party room to the main bar and Mike Divine  
 22 was included in that group?  
 23 A I believe so.  
 24 Q And you, of course, were in that group as well?  
 25 A Right.

Page 23

1 Q And eventually, as the evening moved on Mike Divine  
 2 fell asleep at the bar?  
 3 A Yes.  
 4 Q Who was in that group of people who was at the main  
 5 bar that evening?  
 6 A Again, I believe Ken Fergus was one of them, even a  
 7 few employees that are no longer there.  
 8 Q Anybody else come to mind?  
 9 A No.  
 10 Q Was Mr. Krueger, Stanley Krueger, ever in that  
 11 room, that main bar, that evening while this group  
 12 of UMI employees were in there? Did he pass  
 13 through?  
 14 A Are you referring to '95 or --  
 15 Q '95.  
 16 A I did not see him.  
 17 Q What I'm just trying to find out here is did Mr.  
 18 Krueger come through the main bar back in 1995  
 19 while this group of employees, including Mike  
 20 Divine, were in the main bar?  
 21 A I would say no.  
 22 Q How about Steve Krueger, did he come through that  
 23 room at all, stop, say hi, move through, anything  
 24 like that, back in '95?  
 25 A I don't recall.

1 Q Okay, all right. So back in 1995, that's the year  
 2 you think it's approximately occurring, this  
 3 previous Christmas party, were you at that party  
 4 with your wife at that time?  
 5 A Yes.  
 6 Q Same -- that's Debra?  
 7 A Yes.  
 8 Q And I think you testified that you gave Mike a ride  
 9 home that evening?  
 10 A Yes.  
 11 Q Where was he living?  
 12 A Eagle.  
 13 Q Did he drive to the country club that evening?  
 14 A I don't know if he had driven or not but his  
 15 vehicle was there.  
 16 Q All right. So the vehicle was left behind and you  
 17 gave him a ride home?  
 18 A Actually I drove his vehicle, my wife followed me  
 19 with our car.  
 20 Q Okay. And did he ride with you or your wife?  
 21 A No, he rode with me.  
 22 Q Okay. Did he object to you giving him a ride in  
 23 that fashion that evening?  
 24 A No, he did not.  
 25 Q How is it that you were the one within this group

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1 to give Mike a ride home?  
 2 A 'Cause I'm just too, too nice a guy.  
 3 Q Was there any discussion among people there about,  
 4 "This guy needs a ride home" and who's going to do  
 5 it or did you just volunteer? I'm just trying to  
 6 find out --  
 7 A I think I just went ahead and did it.  
 8 Q Okay. Mike Divine's falling asleep at the bar that  
 9 evening, you understood that -- you understood that  
 10 to be the result of drinking too much?  
 11 A That and lack of sleep.  
 12 Q Have you ever given Mike a ride -- Mike Divine a  
 13 ride home from anything else? Whether it's a  
 14 company function or social gathering, anything  
 15 where you believe he drank too much so you gave him  
 16 a ride home?  
 17 A There was one occasion at a birthday party where I  
 18 did, yes.  
 19 Q That was a private birthday party?  
 20 A Yes.  
 21 Q And when did that occur?  
 22 A Oh, I'd say 1998.  
 23 Q And when in relation to the December 4th Christmas  
 24 party?  
 25 A That would have been before.

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1 Q But, I mean, how much before? Summer, fall,  
2 spring, best you can do?  
3 A I'm trying to think what the weather was like. I  
4 guess it would be spring.  
5 Q Was your wife along at that time?  
6 A Yes.  
7 Q Did Mike Divine object or give you a hard time when  
8 you offered to give him a ride home at that  
9 occasion?  
10 A No.  
11 Q Did the same thing occur, you drove his vehicle and  
12 your wife drove your vehicle?  
13 A Yes.  
14 Q And the reason you gave him a ride home at that  
15 time was because he appeared to drink too much or  
16 had drank too much?  
17 A I can't testify to him drinking too much 'cause I  
18 was there only a few hours with him, but he started  
19 to get into an argument with another person so I  
20 basically just got him out of the place.  
21 Q Was he intoxicated that evening?  
22 A He had been drinking.  
23 Q Was the reason you gave him a ride home was because  
24 he was intoxicated that evening?  
25 A I guess I don't know what your definition of

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1 "intoxicated."  
2 Q I'm just asking you your definition. Was that why  
3 you gave him a ride home because you figured he  
4 drank too much and you gave him a ride home?  
5 A Well, it was that and the combination that he had  
6 moved out of his home in Eagle, he had been living  
7 on a farm. He had a horse, and stuff like that, so  
8 we went out there to look at his horses a little.  
9 Q So you drove his vehicle and he rode along?  
10 A Yes.  
11 Q Any other occasions where you gave him a ride home  
12 from any function where he appeared to drink too  
13 much in your opinion?  
14 A No.  
15 Q Are you aware of him getting a ride home from any  
16 other UMI function, from anybody else because he  
17 drank too much at that function?  
18 A No.  
19 Q Are you aware of him getting a ride home from  
20 anybody else who was employed at UMI - strike  
21 that. Are you aware of him getting a ride home  
22 from anybody else who was employed at UMI and also  
23 attended the December 4th of 1998 party prior to  
24 that party? Do you understand that long,  
25 complicated question?

Page 2

1 A I'm not sure.  
2 Q What I'm trying to find out here, are you aware of  
3 him getting a ride home from anybody else who was  
4 employed at UMI prior to the UMI Christmas party or  
5 December 4th of '98?  
6 A No, I am not.  
7 Q Okay. Let's talk about that night at the party  
8 then on December 4th of 1998. Do you have a  
9 recollection of Mike Divine arriving at the party?  
10 A No.  
11 Q When is the first time you have a recollection of  
12 taking notice of him that evening?  
13 A I had seen him in the main bar. This is before we  
14 even checked into our room.  
15 Q When did you check into the room?  
16 A I'm guessing it was around 6:30.  
17 Q And then you, while making your way to the party  
18 room, saw him at the main bar?  
19 A Yes.  
20 Q Was he alone or with somebody?  
21 A I would assume he was alone.  
22 Q And did you go check in at the company party or did  
23 you go into the main bar?  
24 A We went to the -- we stopped in the party room, we  
25 left right away and went to the main bar and then

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1 we came back the same way 'cause I was with two  
2 other couples at that time.  
3 Q Just so I'm clear here, you saw Mike in the main  
4 bar at about 6:30 but you and your group went to  
5 the room to check in?  
6 A Yes.  
7 Q And then you checked in and then immediately went  
8 back to the main bar?  
9 A No.  
10 Q You went into the room for a while?  
11 A Yes.  
12 Q And then you went to the main bar?  
13 A No. It was only in the main bar before we checked  
14 into the room.  
15 Q Oh, okay. So you went into the main bar before you  
16 checked in and were there for some period of time?  
17 A One drink, yeah.  
18 Q And Mike was there at that time?  
19 A Yes.  
20 Q Were you with him in a group?  
21 A No, no.  
22 Q And then you and your group went into the party; is  
23 that correct?  
24 A Yes.  
25 Q And then Mike eventually made it from the main bar

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1 into the party?  
 2 A I had seen him in the room when we sat down eating.  
 3 Q But you don't know when he arrived?  
 4 A No.  
 5 Q How was it made known that it was time to eat  
 6 dinner? Did anybody -- did Beverly Butterfield or  
 7 anybody start to yell, "It's time to eat, sit  
 8 down," or kind of usher people to their tables or  
 9 how did that work?  
 10 A I believe the people from the country club  
 11 announced it. I don't recall anybody ushering us  
 12 to the table.  
 13 Q It just become known throughout the room that it's  
 14 time to eat?  
 15 A Yes.  
 16 Q According to the schedule, that was around seven  
 17 o'clock?  
 18 A I would say somewhere around there.  
 19 Q And then after dinner there was this awards  
 20 presentation, correct?  
 21 A Right.  
 22 Q There was a situation during that presentation  
 23 where Herb Nash received a longevity award,  
 24 correct?  
 25 A Yes, years of service.

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1 Q All right. And Mike Divine somehow was involved in  
 2 that or became involved in it?  
 3 A Yes. I believe Mike gave Herb a little bit of a  
 4 hard time, yeah.  
 5 Q Did Mike appear intoxicated to you when he gave  
 6 Herb that hard time that you just mentioned?  
 7 A No.  
 8 Q Did he appear in any way under the influence of  
 9 alcohol at that time?  
 10 A Not to me.  
 11 Q Okay. Then after the awards presentation was done,  
 12 did you have any other contact with Mike Divine  
 13 that evening on December 4th of '98?  
 14 A Yes. At the bar.  
 15 Q Okay. Which bar?  
 16 A The bar that was inside the room.  
 17 Q The Tremont Room?  
 18 A Yes, I believe that's what it was called.  
 19 Q The party room then?  
 20 A The party room.  
 21 Q Did that bar have stools or chairs around it or was  
 22 it simply a bar that you could walk over and get a  
 23 drink and move away from?  
 24 A I don't recall seeing any stools.  
 25 Q And was that attended by one bartender or was there

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1 more than one that evening for UMI?  
 2 A I only recall seeing one.  
 3 Q Female?  
 4 A Yes.  
 5 Q All right. You had contact -- you came in contact  
 6 with Mike Divine then after the awards portion of  
 7 the evening, correct?  
 8 A Yes.  
 9 Q And I think you just testified a moment ago you  
 10 were at the bar in the party room when that  
 11 occurred, correct?  
 12 A Yes.  
 13 Q Tell me about what happened?  
 14 A I had been standing with my back to the bar, I was  
 15 talking to my wife and another couple and I  
 16 overheard the conversation of Mike had gone up --  
 17 evidently he had approached the bar to buy several  
 18 drinks and the bartender had asked if he had  
 19 someone that was going to take him home.  
 20 Q You overheard that?  
 21 A Yes, I did.  
 22 Q How far do you think you were standing from Mike  
 23 Divine when he had the conversation with the  
 24 bartender?  
 25 A Well, he had been standing right next to me but he

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1 was facing the bar and I was facing away from the  
 2 bar.  
 3 Q I see. So he was within three feet when he had  
 4 this conversation?  
 5 A Yes.  
 6 Q So you overheard clearly what the bartender said to  
 7 him?  
 8 A Yes.  
 9 Q And she asked him if he had a ride home?  
 10 A Yes.  
 11 Q Did you hear her saying anything else to him where  
 12 she commented upon his state of inebriation, if you  
 13 want to use that term?  
 14 A No.  
 15 Q Simply, "Do you have a ride home?"  
 16 A Yes.  
 17 Q What did you understand that to mean coming from  
 18 the bartender?  
 19 MR. FREDERICKS: Foundation. Calls for  
 20 speculation.  
 21 BY MR. BERTLING:  
 22 Q I'm just asking what you thought she meant by that?  
 23 MR. FREDERICKS: Go ahead.  
 24 THE WITNESS: I believe designated  
 25 driver.



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1 BY MR. BERTLING:  
2 Q Did you conclude from what she said as a bartender  
3 that she was questioning whether or not she felt he  
4 was sober enough to drive home safely?  
5 MR. FREDERICKS: Same objection. Go  
6 ahead.  
7 THE WITNESS: Yes.  
8 BY MR. BERTLING:  
9 Q What I said was accurate, correct? What I said was  
10 accurate? I'm just clarifying that because of the  
11 objection, I want to make it clear. What I said is  
12 accurate, that is what you took her statement to  
13 mean?  
14 A She was questioning his condition, yes.  
15 Q And this was about what time of evening?  
16 A I'm guessing around 8:30.  
17 Q Okay. Up until that point in time did you come to  
18 the conclusion from any source that Mike had drank  
19 too much to drive home safely?  
20 A No.  
21 Q Did you hear anybody commenting upon how much he  
22 drank that evening?  
23 A No.  
24 Q Prior to that point?  
25 A No.

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1 Q Okay. After hearing the bartender ask Mike Divine  
2 whether he had a ride home, what did you do?  
3 A I had just turned to see what was going on, more or  
4 less, and Mike had made a motion like I was it.  
5 Q All right. And he made a motion with his head?  
6 A Yes.  
7 Q So you interpreted his motion to be a signal to the  
8 bartender to you that you were his ride home?  
9 A Uh-huh.  
10 Q Is that a yes?  
11 A Yes.  
12 Q So you saw him do that?  
13 A Yes.  
14 Q And she was looking at him when -- the bartender  
15 was looking at him when he did that?  
16 A Yes.  
17 Q And what did you do in response to that?  
18 A I just nodded my head.  
19 Q To who?  
20 A To the bartender.  
21 Q And by nodding your head you were indicating to the  
22 bartender that you were going to give him a ride  
23 home, correct?  
24 A Yes.  
25 Q And you understood by nodding to the bartender then

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1 that by giving her that assurance that she would  
2 serve him the drinks?  
3 MR. FREDERICKS: Object to form. Go  
4 ahead.  
5 THE WITNESS: No, I did not.  
6 BY MR. BERTLING:  
7 Q Okay. What did you think would occur as a result  
8 of nodding to the bartender, giving her that  
9 signal? What would be her likely response, in your  
10 mind?  
11 MR. FREDERICKS: Objection, multiple and  
12 object to form and foundation.  
13 MR. BERTLING: It is multiple.  
14 BY MR. BERTLING:  
15 Q Can you answer it?  
16 MR. FREDERICKS: Go ahead.  
17 THE WITNESS: Could you repeat the  
18 question?  
19 BY MR. BERTLING:  
20 Q Sure. It was a multiple question. By nodding to  
21 the bartender what did you believe would be her  
22 likely response under those circumstances?  
23 MR. FREDERICKS: Form and foundation. Go  
24 ahead.  
25 THE WITNESS: I thought we were kidding

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1 around, to be real truthful.  
2 BY MR. BERTLING:  
3 Q Your testimony a moment ago was that by nodding to  
4 her you intended to give him a ride home, correct?  
5 A Yes.  
6 Q So when you nodded to her you weren't kidding  
7 around about that fact, you were, in your mind,  
8 accepting the responsibility of giving him a ride  
9 home to her, correct?  
10 MR. FREDERICKS: Object to form and  
11 foundation. Go ahead. Also mischaracterizing and  
12 misstating his testimony. Go ahead.  
13 THE WITNESS: I did not -- I did not  
14 think the conversation was serious at that point.  
15 The way you had phrased the questions to me before,  
16 I was answering your question based on your  
17 question.  
18 BY MR. BERTLING:  
19 Q By nodding to the bartender at that point, in your  
20 mind, you were thinking, "I'm going to give Mike  
21 Divine a ride home," that's accurate, correct?  
22 A Yes.  
23 Q And that was the purpose for nodding to the  
24 bartender was to give her that signal, correct,  
25 that this was your intent?

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1 A Yes.  
 2 Q Did he -- strike that. Did she serve him the  
 3 drinks at that point in time?  
 4 A Yes.  
 5 Q Do you know how many drinks there were?  
 6 A I thought there were three.  
 7 Q Do you recall what they were?  
 8 A I believe it was a glass of wine, a bloody Mary--  
 9 maybe there was two drinks. I only recall a glass  
 10 of wine and a bloody Mary.  
 11 Q Do you know who Mike was with at that time?  
 12 A No, I do not. But he did go back to his table.  
 13 Q All right. The table he had eaten at?  
 14 A Yes.  
 15 Q Did Mike appear intoxicated at that point to you?  
 16 MR. FREDERICKS: Asked and answered.  
 17 THE WITNESS: No.  
 18 BY MR. BERTLING:  
 19 Q Now, on December 4th of 1998, you were a department  
 20 head, correct?  
 21 A Yes.  
 22 Q When you intended to give Mike a ride home did you  
 23 give this -- did you formulate this intention and  
 24 give this signal to the bartender that you would do  
 25 that as a department head for UMI?

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1 MR. REID: Object to the form.  
 2 THE WITNESS: No.  
 3 BY MR. BERTLING:  
 4 Q You were doing that individually?  
 5 A Yes.  
 6 Q Did you have any other contact with Mike Divine  
 7 after that, after he went back to his table with  
 8 these drinks?  
 9 A Yes.  
 10 Q And what happened, tell me the circumstances of  
 11 that?  
 12 A I believe it was around 9:00 or 9:15 he had asked  
 13 me to buy him a drink.  
 14 Q Were you still at the same -- approximately the  
 15 same spot as you were before?  
 16 A No.  
 17 Q Where were you at this time -- this point?  
 18 A I was out in front, to the side of the bar talking  
 19 with different people.  
 20 Q All right. You were still in the party room for  
 21 the --  
 22 A Yes.  
 23 Q And so Mike came up to you and asked you if you'd  
 24 buy him a drink?  
 25 A Yes.

1 Q How did he appear at that point insofar as his  
 2 state of intoxication?  
 3 A Didn't seem that bad.  
 4 Q Did he seem at all intoxicated to you? Meaning,  
 5 did you see anything about him that made you think  
 6 that this guy had been drinking?  
 7 A Well, I could tell he was drinking, just -- you  
 8 could smell it on him but, I mean, he wasn't  
 9 slurring his words or falling down or anything like  
 10 that.  
 11 Q So his speech seemed normal to you?  
 12 A Yes.  
 13 Q And he didn't appear to have any problems moving  
 14 about? I mean, he wasn't stumbling or having  
 15 difficulty, as you recall?  
 16 A Not when I seen him.  
 17 Q Okay. And did he appear steady on his feet when he  
 18 was talking to you, if you recall?  
 19 A Yes.  
 20 Q When he asked you to buy him a drink did you  
 21 question why he was asking you to do that?  
 22 A I didn't question him at all. I think he  
 23 volunteered the information.  
 24 Q What did you hear?  
 25 A Well, he told me that the bartender wouldn't serve

1 him.  
 2 Q The bartender cut him off?  
 3 A Yes.  
 4 Q Did you ask him why he was cut off?  
 5 A No.  
 6 Q Did you conclude on your own why she cut him off --  
 7 strike that. What did you conclude was the reason  
 8 she cut him off?  
 9 MR. FREDERICKS: Form and foundation.  
 10 Go ahead.  
 11 THE WITNESS: Maybe the time lapse  
 12 between the prior occasion. And that's an  
 13 assumption on my part that it was the same  
 14 bartender he was talking about.  
 15 BY MR. BERTLING:  
 16 Q All right. Can you tell me whether the same  
 17 bartender was in the room at the bar as there was  
 18 -- as was there when you nodded?  
 19 A No, I couldn't attest to that.  
 20 Q Did you conclude, when you were informed that he  
 21 had been cut off, that he was cut off because a  
 22 bartender concluded that he shouldn't drink any  
 23 more alcohol that night given the state of his  
 24 inebriation?  
 25 MR. FREDERICKS: Form and foundation. Go

1 ahead.  
2 THE WITNESS: No. He just told me the  
3 bartender would not serve him.  
4 BY MR. BERTLING:  
5 Q Have you ever, prior to that, been in a bar or at a  
6 social gathering where a professional bartender cut  
7 somebody off, wouldn't serve them any more?  
8 A Yes.  
9 Q And what did you conclude was the reason for that  
10 on prior occasions?  
11 A Bartender felt the person was intoxicated.  
12 Q And did you come to that same conclusion on  
13 December 4th of '98 when you were informed that  
14 Mike was being cut off?  
15 MR. FREDERICKS: Form and foundation. Go  
16 ahead.  
17 THE WITNESS: No.  
18 BY MR. BERTLING:  
19 Q Did you buy him a drink after he asked?  
20 A No.  
21 Q You just told him no?  
22 A Yes.  
23 Q Why is that?  
24 A I just told him I couldn't do that. I said, "The  
25 bartender cut you off, you know, I can't do

1 anything about it."  
2 Q So, it's your testimony this occurred about 9:00  
3 to 9:15 p.m.?  
4 A Yes.  
5 Q Let me back up a second. After nodding to the  
6 bartender, as we discussed previously, did you tell  
7 anybody else at the party that the bartender was  
8 trying to find out whether anybody was going to  
9 give Mike Divine a ride home?  
10 A I'm not sure I understood that question.  
11 Q Sure. You testified a while ago that with your  
12 back to the bar you heard the bartender ask Mike  
13 Divine, "Do you have a ride home," correct?  
14 A Yes.  
15 Q All right. Did you communicate what you heard to  
16 anybody else at the party that the bartender at  
17 that point asked Mike Divine if he had a ride home?  
18 A I don't recall discussing it with anyone else but  
19 there would seem to be a few other people that were  
20 aware of it.  
21 Q Okay. Who was aware of it?  
22 A The people that I was talking to that were actually  
23 facing the bar.  
24 Q And who was that?  
25 A I believe that was Mark Siglinsky and his wife,

1 again Ken Fergus and my wife.  
2 Q Anybody else that you believe was aware of this  
3 comment by the bartender?  
4 A Not that I'm aware of. No one additional.  
5 Q Ken Fergus is employed -- or was employed in  
6 December of '98 how by UMI?  
7 A Are you asking me what his title was?  
8 Q Yeah.  
9 A He was account manager, sales.  
10 Q And Mark Siglinsky was what, at that time, in  
11 December of '98?  
12 A Shipping manager, manager of shipping.  
13 Q Was he department head then?  
14 A No. He would have been a supervisor but not a  
15 department head.  
16 Q Okay. How many people did he supervise back in  
17 December of '98?  
18 A Two or three.  
19 Q Okay. Was this comment by the bartender about Mike  
20 having a ride home, was that, as far as you know,  
21 ever communicated that evening to Stanley Krueger?  
22 A I don't believe so.  
23 Q Was it communicated to Steve Krueger?  
24 A Not that I'm aware of.  
25 Q All right. How about your brother Al, that

1 evening?  
2 A I'm not aware that it was communicated to anyone.  
3 Q Okay. Then after Mike Divine asked you to buy him  
4 a drink and you declined, did you have any more  
5 contact with him that evening?  
6 A No, I did not.  
7 Q Where was the last -- where was Mike Divine the  
8 last time you saw him that evening?  
9 A Standing at the bar asking me for a drink.  
10 Q Okay. So after you declined to give -- to buy him  
11 a drink at that time, you don't have another  
12 recollection of seeing him anywhere?  
13 A No, I do not.  
14 Q Can you tell me whether he left the room or did he  
15 remain in the room?  
16 A To my knowledge he was not in the room.  
17 Q Why do you say that?  
18 A I don't recall seeing him. I mean, there weren't  
19 that many people in the room to begin with.  
20 Q And the purpose of my previous question was, do you  
21 have a recollection of seeing him exit or leave the  
22 room?  
23 A No, I do not.  
24 Q You just declined to buy him a drink, you were  
25 talking to the people you were with and then you

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1 don't have a recollection of him being in the room  
2 any more that evening, correct?  
3 A Yes.  
4 Q What time did you leave the party?  
5 A I want to say ten o'clock.  
6 Q The last time you saw Mike Divine, at about 9:00 to  
7 9:15, did you indicate to him that you would not be  
8 giving him a ride home?  
9 A No.  
10 Q After nodding to the bartender did you ever  
11 indicate to Mike Divine that you would not be  
12 giving him a ride home?  
13 A No.  
14 Q Did you tell anybody at the party, whether they  
15 were staff of Silver Spring or other attendees,  
16 that you were not going to give him a ride home  
17 that evening?  
18 A No.  
19 Q At some point that evening you decided not to give  
20 him a ride home, correct?  
21 A Yes.  
22 Q And I understand from reading testimony at the  
23 inquest that basically your wife felt it was  
24 somebody else's turn; is that an accurate  
25 statement?

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1 A Yes.  
2 Q And was that based upon the fact that you had done  
3 it twice before and she was involved in that twice  
4 before?  
5 A Exactly.  
6 Q Okay. And what time did that occur? Meaning,  
7 because of speaking with your wife you decided not  
8 to give him a ride home?  
9 MR. FREDERICKS: You mean, when was the  
10 conversation with his wife?  
11 MR. BERTLING: Yeah. When did he reach  
12 the decision not to give him a ride home?  
13 MR. FREDERICKS: Well, that's a different  
14 question.  
15 MR. BERTLING: Well, that's the one I  
16 want answered.  
17 BY MR. BERTLING:  
18 Q When did you decide not to give him a ride home?  
19 A I believe when we left.  
20 Q And I'm sorry, you said that was around ten  
21 o'clock?  
22 A Yes.  
23 Q Did you look for Mike anywhere at that point to  
24 communicate that to him?  
25 A No.

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1 Q When you arrived at the party earlier that evening,  
2 you were able to look into the main bar and see  
3 Mike in there drinking?  
4 A No.  
5 Q How did you learn that he was in the main bar?  
6 A We walked to the main bar.  
7 Q I see. When you left did you look in the main bar  
8 at all?  
9 A I did not.  
10 Q Just give me a second. How did you learn of the  
11 accident that occurred later that evening?  
12 A Phone call Saturday morning.  
13 Q Did you -- strike that. Who called you?  
14 A Actually I didn't take the call, my wife did.  
15 Q Who was that, do you recall?  
16 A I believe it was my brother, Al.  
17 Q Did you make any phone calls yourself personally in  
18 response to that phone call?  
19 A No, I did not.  
20 Q After the accident on the following Monday I assume  
21 there was a staff meeting?  
22 A Normal Monday morning.  
23 Q Was this accident discussed at the staff meeting?  
24 A It was talked about, yes.  
25 Q Was there any discussion at the staff meeting about

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1 the extent of Mike's drinking that evening?  
2 A No.  
3 Q Prior to the accident?  
4 A No.  
5 Q Did you tell anybody at the staff meeting about the  
6 bartender asking if he had a ride home and that  
7 also that evening Mike had indicated to you that he  
8 had been cut off?  
9 A No.  
10 Q This staff meeting on the Monday following the  
11 accident, were there any attorneys present at this  
12 staff meeting?  
13 A No.  
14 Q Just your normal staff meeting?  
15 A Yes.  
16 Q Was there a meeting between Mr. Krueger, Stanley  
17 Krueger and other UMI employees -- or the remaining  
18 UMI employees sometime later that week about this  
19 accident?  
20 A I truly don't recall.  
21 Q Okay. Was there such a meeting at some point in  
22 time, whether it was that week or later?  
23 A I recall Stan having just a general meeting with  
24 the employees.  
25 Q About this accident?



1 A Yes.  
2 Q Were you there at the time?  
3 A At that particular meeting, yes.  
4 Q What was discussed?  
5 A What I recall basically is that there was going to  
6 be a lot of questions asked and to cooperate.  
7 Q You know who Roy Wagner is?  
8 A Yes, I do.  
9 Q And you know who Roger Pyzyk is?  
10 A Yes.  
11 Q And you understood Roy Wagner to be the corporate  
12 attorney --  
13 A Correct.  
14 Q -- for UMI?  
15 A Yes.  
16 Q And you knew Roger Pyzyk to be the attorney  
17 representing UMI in the inquest?  
18 A Yes.  
19 Q Did you consider either of those gentlemen to be  
20 your own personal attorney in this case?  
21 A No, I did not.  
22 Q They were paid for by UMI?  
23 A Correct.  
24 Q Did either of those gentlemen indicate to you not  
25 to talk to the police unless they were present?

1 A No.  
2 Q Was an offer ever made to you by anybody that these  
3 gentlemen or any other attorneys would represent  
4 you at any point in this case at the expense of  
5 UMI?  
6 A No.  
7 Q Did you have a conversation with a police officer  
8 from the Menomonee Falls Police Department after  
9 the accident?  
10 A Yes.  
11 Q And did you have more than one or just one?  
12 A Just one.  
13 Q And did this occur at UMI or at UMI's attorney's  
14 office?  
15 A It was at Roy Wagner's office.  
16 Q And Roy was present?  
17 A Yes.  
18 Q Was Roger Pyzyk present?  
19 A Yes.  
20 Q Did you have a meeting with Roy before the meeting  
21 with the police officer to discuss the upcoming  
22 interview?  
23 A We just met there at the time that was appointed.  
24 Q Who was present, Stanley Krueger?  
25 A Stanley and myself.

1 Q Was Beverly Butterfield present?  
2 A No.  
3 Q Was there also another meeting just before the  
4 inquest last February were you met with attorneys  
5 again to discuss the upcoming inquest?  
6 A I believe that the attorneys visited UMI and talked  
7 to the employees.  
8 Q As a group or individually?  
9 A As a group.  
10 Q Would they have only been the employees that were  
11 subpoenaed?  
12 A No. It was every one.  
13 Q And these attorneys again would be Mr. Pyzyk or Mr.  
14 Wagner?  
15 A Yes.  
16 Q Or both?  
17 A Both.  
18 Q What was discussed during that meeting?  
19 A Just trying, I guess, to explain what an inquest  
20 was all about.  
21 Q During that meeting you didn't consider either of  
22 them to be your own personal attorney?  
23 A No.  
24 Q They were the corporate attorneys?  
25 A Correct.

1 Q Prior to leaving the party on December 4th of 1998,  
2 did you overhear anybody making any comments about  
3 Mike Divine and the extent he was drinking that  
4 evening?  
5 A No.  
6 MR. BERTLING: Just give me a second. I  
7 think I'm done.  
8 BY MR. BERTLING:  
9 Q Do you know how many UMI employees attended the  
10 party on December 4th of 1998?  
11 A No, I do not.  
12 Q Can you give me an estimate?  
13 A Forty. That would be -- that would include spouses  
14 and friends. I'm talking total people.  
15 Q Okay. What percentage of employees from the total  
16 work force do you think attended the party. Are  
17 you able to give me that estimates?  
18 A All I could give you is a SWAG on that.  
19 Q A what?  
20 A A SWAG.  
21 Q Go ahead.  
22 A That's a Scientific Wild Ass Guess.  
23 Q Okay. I was going to say. Go ahead. We get those  
24 all the time.  
25 A I'd say fifty percent.

<p style="text-align: right;">Page 54</p> <p>1 Q In years past -- strike that. Did this party seem 2 -- did this party seem attended to the same extent 3 as years past or was the attendance down or up or 4 can you give me a sense of that? 5 A Seemed about the same. 6 Q After the accident did you meet with anybody from 7 UMI's insurance company, Ohio Casualty, as has been 8 identified? 9 A No. 10 Q Did you speak with an adjuster by the name of James 11 Becker? 12 A No, I did not. 13 Q Was he at UMI talking to people about this 14 accident? 15 A Yes, I believe he was. 16 MR. BERTLING: Those are all the 17 questions I have. Thank you. 18 MR. MINGO: I just have a couple of 19 questions. 20 EXAMINATION 21 BY MR. MINGO: 22 Q Your decision to attend the party on December 4 of 23 '98 was left entirely up to you and your wife; is 24 that correct? 25 A Correct.</p>	<p style="text-align: right;">Page 56</p> <p>1 A That had been his vehicle at the time, yes. 2 Q Is that the vehicle you'd driven those two prior 3 occasions? 4 A No. 5 Q What was your title? 6 A Manager of engineering and quality assurance. 7 Q Typical workday, what time did you get to the 8 office and what time did you leave? 9 A My normal hours are 7:00 to 3:30. 10 Q And you performed all your duties at the facility 11 that UMI has? 12 A Yes. 13 Q Is that their only facility? 14 A Yes. 15 Q Are you salaried or paid by the hour? 16 A I'm salaried. 17 MR. REID: That's all I've got for you. 18 MR. FREDERICKS: I have a few questions, 19 John. 20 EXAMINATION 21 BY MR. FREDERICKS: 22 Q The drinks that you recall the bartender serving 23 Mike Divine while you were standing with your back 24 to the bar was a wine and a bloody Mary? 25 A Correct.</p>
<p style="text-align: right;">Page 55</p> <p>1 Q You were not under pressure from Mr. Krueger or 2 anyone else from UMI to attend; is that true? 3 A That's true. 4 Q And to the best of your knowledge none of the other 5 employees were under any kind of pressure to attend 6 the party? 7 A Best of my knowledge. 8 Q When you nodded to the bartender such as to 9 indicate that you would give Mr. Divine a ride 10 home, that was something you did individually as 11 opposed to acting on behalf of UMI; is that 12 correct? 13 A Correct. 14 Q And again you did that because you were, as you 15 said, a nice guy? 16 A Yes. 17 MR. MINGO: I have nothing else. 18 MR. ANDRES: I have nothing. 19 EXAMINATION 20 BY MR. REID: 21 Q As you sit here today you understand that Mr. 22 Divine was driving a black Chevy Blazer at the time 23 of the accident? 24 A I believe so. 25 Q All right. Is that his car?</p>	<p style="text-align: right;">Page 57</p> <p>1 Q Did you understand that Mike was buying those for 2 himself? 3 A No. I was under the impression he had been buying 4 them for people at the table. 5 Q Is Mike a wine drinker, if you know? 6 A I've never seen him drink a glass of wine, no. 7 Q How about a bloody Mary? 8 A Nor bloody Mary, strictly beer. 9 Q What did you mean then in response to one of Mr. 10 Bertling's question that you thought -- or you 11 thought that you were kidding around or the 12 bartender was kidding or the three of you -- 13 A Well, Mike's nature it wouldn't surprise me at all 14 for him to heckle with the bartender and vice versa 15 so seriously I did not take the whole conversation 16 seriously at that point. 17 Q Why not, can you explain that? 18 A Well, again, it was Mike's nature to be joking 19 around with the bartender but I thought they were 20 just going at it. 21 MR. FREDERICKS: Okay. 22 MR. BERTLING: I have nothing further. 23 (Proceedings concluded at 1:13 p.m.) 24 25</p>

1 STATE OF WISCONSIN } ss:  
2 COUNTY OF MILWAUKEE )  
3  
4

5 I, JILL A. BLESKEY, Registered  
6 Professional Reporter and Notary Public in and for the  
7 State of Wisconsin, do hereby certify that the above  
8 deposition of JOHN H. KREUSER was recorded by me on the  
9 20th day of December, 1999, and reduced to writing under  
10 my personal direction.

11 I further certify that I am not a  
12 relative or employee or attorney or counsel of any of  
13 the parties, or a relative or employee of such attorney  
14 or counsel, or financially interested directly or  
15 indirectly in this action.

16 In witness whereof I have hereunder set  
17 my hand and affixed my seal of office at Milwaukee,  
18 Wisconsin, this 23rd day of December, 1999.

19

20

21

22 Notary Public

23 In and for the State of Wisconsin

24

25 My Commission Expires: June 24, 2001.

IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

STATE OF WISCONSIN

-----

RICKY D. STEPHENSON, Individually  
and as Personal Representative for  
the ESTATE OF KATHY M. STEPHENSON,

Plaintiff,

-vs-

Case No. 99-CV-004772  
Code No. 30101

UNIVERSAL METRICS, INCORPORATED,  
JOHN H. KREUSER, AMERICAN FAMILY  
MUTUAL INSURANCE COMPANY, WEST  
AMERICA INSURANCE COMPANY and ABC  
INSURANCE COMPANY,

**COPY**

Defendants.

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Examination of STANLEY KRUEGER, taken at  
the instance of the Plaintiffs, under and pursuant to  
Section 804.05 of the Wisconsin Statutes, pursuant to  
Stipulation, before JILL A. BLESKEY, Registered  
Professional Reporter and Notary Public in and for the  
State of Wisconsin, at Borgelt, Powell, Peterson &  
Frauen, S.C., 735 North Water Street, Fifteenth Floor,  
Milwaukee, Wisconsin, on the 20th day of December, 1999,  
commencing at 10:34 a.m. and concluding at 12:04 p.m.



A P P E A R A N C E S		Page 2
1		
2	McLARIO, HELM & BERTLING, S.C., by	
3	MR. MICHAEL L. BERTLING,	
4	N88 W16783 Main Street,	
	Menomonee Falls, Wisconsin 53051,	
	appeared on behalf of the Plaintiff.	
5	LAW OFFICES OF MINGO & YANKALA, S.C., by	
6	MR. MARK J. MINGO,	
7	Loyalty Building, Suite 210,	
8	611 North Broadway,	
9	Milwaukee, Wisconsin 53202-5004,	
10	appeared on behalf of the Defendant	
11	Universal Metrics, Incorporated.	
12		
13	BORGELT, POWELL, PETERSON & FRAUEN, S.C., by	
14	MR. JAMES M. FREDERICKS,	
15	735 North Water Street, Fifteenth Floor,	
16	Milwaukee, Wisconsin 53202-4188,	
17	appeared on behalf of the Defendant	
18	John H. Kreuser.	
19		
20	COOK & FRANK, S.C., by	
21	MR. PHILIP C. REID,	
22	660 East Mason Street,	
23	Milwaukee, Wisconsin 53202-3877,	
24	appeared on behalf of the Defendant	
25	West America Insurance Company.	
16	PETERSON, JOHNSON & MURRAY, S.C., by	
17	MR. DAVID F. ANDRES,	
18	733 North Van Buren Street, Sixth Floor,	
19	Milwaukee, Wisconsin 53202,	
20	appeared on behalf of the Defendant	
21	American Family Mutual Insurance Company.	
22		
23	A L S O P R E S E N T	
24	Mr. John H. Kreuser, Defendant.	
25		
22		
23	I N D E X	
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25	Mr. Bertling .....	4
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2	Mr. Bertling .....	74
3	Mr. Reid .....	77
4	Exhibits:	Marked ID
5	No. 1 - Booking contract for Silver Spring	
6	Country Club .....	4 11
7	No. 2 - Memo posted for all employees making	
8	them aware of date of December 4th ...	4 22
9	No. 3 - Form providing information to Silver	
10	Spring regarding menu choices .....	4 26
11	Requests:	(None) Page
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TRANSCRIPT OF PROCEEDINGS  
(Exhibit Nos. 1 through 3 were marked.)  
STANLEY KRUEGER, called as a witness  
herein, having been first duly sworn on oath, was  
examined and testified as follows:  
EXAMINATION  
BY MR. BERTLING:  
Q Would you please state your name for the record?  
A My name is Stan Krueger.  
Q And Mr. Krueger, do you live in Menomonee Falls,  
Wisconsin?  
A Yes.  
Q And are you the president and CEO of a business  
called Universal Metrics, Incorporated?  
A The president of Universal Metrics, yes.  
Q And Universal Metrics, Incorporated has operated by  
that name for how many years?  
A I believe since 1988.  
Q Prior to that did it operate under a different  
name?  
A Prior to that I had two companies, one was  
Universal Fabricators and the other was Metric  
Fasteners and they were combined and formed  
Universal Metrics.  
Q And then it has operated under that name since 1988

Page 5

you told me?  
A I believe it's '88, yes.  
Q What is the business of Universal Metrics,  
Incorporated?  
A Well, our primary business is manufacturing,  
fabricating, machining and distribution of metric  
products.  
Q Now, you're here today for a deposition in a case  
that will involve and we'll be discussing a  
Christmas party that occurred back on December 4th  
of 1998. Have you reviewed any documents to help  
prepare yourself for this deposition here today?  
A Probably. I've reviewed my -- some of my documents  
made available to me, yes.  
Q Okay. Can you provide a list of those documents as  
best you can?  
A Are you asking a list of everything I've looked at  
or what? I'm not sure.  
Q What I'm trying to find out here is what have you  
reviewed to prepare yourself for this deposition?  
A I'm not after what you may have reviewed with  
respect to this party since December 4th of 1998,  
simply what you may have reviewed to prepare  
yourself for this deposition?  
A Well, probably the fact -- I went over the --

Page 6

Page 8

1 whatever it's called, I don't know the term.  
 2 Q Transcript?  
 3 A Charging us with --  
 4 MR. MINGO: Complaint?  
 5 THE WITNESS: Complaint, thank you.  
 6 BY MR. BERTLING:  
 7 Q All right. You went over the complaint that was  
 8 prepared by my office in this civil matter?  
 9 A I don't know whose office you're with.  
 10 Q In this civil matter or --  
 11 A Yes.  
 12 Q Have you reviewed anything else with respect --  
 13 strike that. Have you reviewed anything else to  
 14 prepare yourself for this deposition?  
 15 A I read over the testimony that was given at the  
 16 inquest sometime last -- earlier this year.  
 17 Q Anything else?  
 18 A That's about it.  
 19 Q All right. Have you reviewed any documents  
 20 prepared by either the Waukesha County District  
 21 Attorney's Office or Menomonee Falls Police  
 22 Department regarding any interviews that law  
 23 enforcement officials may have had with you  
 24 regarding this party?  
 25 A Any interviews they've had with me?

1 those two vice presidents. Can you give me then a  
 2 description of the chain of command, if you will,  
 3 below the vice president at the UMI in December of  
 4 1998? Do you understand my question?  
 5 A People that are responsible, different departments  
 6 type thing?  
 7 Q Yeah. Let me put it to you this way because I've  
 8 reviewed the transcript so I know a lot of this  
 9 information, I think. I just want to confirm a few  
 10 things with you. Is it true in December of 1998  
 11 that beneath the vice president in the chain of  
 12 command, if you will, would be the various  
 13 department heads at UMI?  
 14 A I think -- yeah, that's a fair statement.  
 15 Q How many department heads existed back in December  
 16 of 1998?  
 17 A Probably same as now.  
 18 Q How many is that?  
 19 A Engineering QA is one, human resources is one,  
 20 accounting is another.  
 21 Q Anything else?  
 22 A That's it.  
 23 Q The head of the engineering department was John  
 24 Kreuser?  
 25 A Correct.

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Page 9

1 Q Right.  
 2 A No.  
 3 Q Anything else come to mind that you may have  
 4 reviewed to prepare yourself for this deposition  
 5 today other than the complaint in this case and a  
 6 transcript of your testimony from the inquest?  
 7 A Not that I can recall, no.  
 8 Q All right. You testified a moment ago that you are  
 9 currently the president of Universal Metrics, Inc.  
 10 A Correct.  
 11 Q And I can refer to that company as UMI?  
 12 A Please.  
 13 Q All right. And you were president of this company  
 14 in December of 1998?  
 15 A Yes.  
 16 Q At that time the company had two vice presidents?  
 17 A Correct.  
 18 Q One would be your son, Steven?  
 19 A Yes.  
 20 Q And the other was a gentleman by the name of Al  
 21 Kreuser?  
 22 A Correct.  
 23 Q Any other vice presidents at that time?  
 24 A No.  
 25 Q Okay. So we have yourself as president and then

1 Q Still is?  
 2 A Yes.  
 3 Q The head of human resources is Beverly Butterfield?  
 4 A Correct.  
 5 Q And who would be the head of accounting?  
 6 A Donald Lehr, L-E-H-R.  
 7 Q Was Donald at the Christmas party on December 4th  
 8 of 1998?  
 9 A I believe so.  
 10 Q All right. How many employees did UMI have in  
 11 December of 1998?  
 12 A About forty.  
 13 Q Now, we're going to be talking about this Christmas  
 14 party that occurred on December 4th of 1998. How  
 15 long had UMI been having annual, seasonal Christmas  
 16 parties prior to December of 1998?  
 17 A Fifteen, twenty years, I don't know.  
 18 Q All right.  
 19 A Many years.  
 20 Q And in addition to the Christmas party did UMI have  
 21 any other regular gatherings of employees outside  
 22 of the workplace? For example, a summer picnic or  
 23 something along those lines?  
 24 A We've had that. Probably not as regular as the  
 25 Christmas party.

Page 10

1 Q Say within ten years prior to December of 1998 how  
2 many summer picnics do you think UMI put on?  
3 A I don't know.  
4 Q Can you give me any estimate?  
5 A How many years?  
6 Q Ten years prior to 1998.  
7 A Probably eight.  
8 Q Did UMI have a summer party in the summer of 1998  
9 prior to this Christmas party we're going to be  
10 talking about?  
11 A I believe so.  
12 Q Where would that be held?  
13 A I don't know, I don't recall.  
14 Q Was it an outdoor activity so you would go to a  
15 park, something like that?  
16 A Yeah, something like that usually.  
17 Q All right. Let's talk a little bit about the  
18 December 4th of 1998 party. This party occurred at  
19 the Silver Spring Country Club, correct?  
20 A Yes.  
21 Q Had UMI used that facility for previous parties?  
22 A Yes.  
23 Q Was this something that was used for a number of  
24 years prior to December of 1998?  
25 A I don't know. We'd been there more than one time

Page 11

1 and I don't know how many.  
2 Q All right. Within UMI the person who was  
3 coordinator or in charge of this party would have  
4 been Beverly Butterfield?  
5 A Correct.  
6 Q Can you tell me whether you recall having the  
7 Christmas party in December -- or for the Christmas  
8 season of 1997 at Silver Spring Country Club?  
9 A I believe so but I'm not certain.  
10 Q I'm going to show you what's been -- what I've  
11 marked as Exhibit 1 for identification and this is  
12 a document that I'd ask you to identify, if you  
13 can?  
14 A Appears to be a booking contract for Silver Spring  
15 Country Club.  
16 Q And the date on that booking contract is January  
17 29th of 1998?  
18 A Correct.  
19 Q And this booking contract makes reference to a  
20 December 4th of 1998 function; is that correct?  
21 A Correct.  
22 Q And it's identified -- or it identifies the type of  
23 function as being cocktails-dinner; is that  
24 correct?  
25 A Correct.

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1 Q Take a look at this document if you need to but  
2 would you be able to confirm that this would be the  
3 booking contract for the December 4th of 1998  
4 Christmas party?  
5 A Certainly appears to be, yes.  
6 Q And it appears to be that the party was booked then  
7 on January 29th, 1998, little over ten months prior  
8 to its actual occurrence?  
9 A Yes.  
10 Q Were you at all involved in booking this back in  
11 January of '98 or was that left up to someone else  
12 within the company?  
13 A I was not involved in the actual booking.  
14 Q It's indicated on Exhibit 1 here that the function  
15 would be coordinated by Beverly Butterfield; is  
16 that accurate?  
17 A Yes.  
18 Q Was it necessary for Beverly to come to you to get  
19 permission to book this function at the country  
20 club?  
21 A No.  
22 Q In booking the -- in booking this event was the  
23 calendars of various management personnel at UMI  
24 consulted to make sure that they could make the  
25 December 4th date?

Page 13

1 A No.  
2 Q Did you have any input or any information you can  
3 provide me as to why December 4th was chosen for  
4 the date for this party?  
5 A No.  
6 Q Do you recall when you first would have become  
7 aware of the December 4th of 1998 date for this  
8 party?  
9 A No.  
10 Q Eventually -- strike that. Subsequent to booking  
11 this a notice was presented to employees at UMI  
12 notifying them of the December 4th of 1998 party?  
13 A Correct.  
14 Q Let's talk about just the party itself. Who paid  
15 for this party?  
16 A Per the contract this was between Universal Metrics  
17 and Silver Spring Country Club.  
18 Q Did the employees contribute anything insofar as  
19 paying for the party?  
20 A No, they did not.  
21 Q The booking contract makes reference to the fact  
22 that a room was booked that I believe was called  
23 the Tremont Room?  
24 A Okay, yes.  
25 Q And food was going to be provided at this party?

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Page 16

1 A Correct.  
 2 Q Two drink tickets would be available per person at  
 3 this party?  
 4 A Two beverage tickets, yes.  
 5 Q It's also my understanding that wine would be  
 6 served with dinner for those who wanted it?  
 7 A We occasionally did that, yes.  
 8 Q And in addition to this the Silver Spring Country  
 9 Club would also provide staff that would serve the  
 10 food?  
 11 A That's -- yes. That's what they do.  
 12 Q All right. And they would also provide a bartender  
 13 for the bar that was set up within the Tremont  
 14 Room?  
 15 A That's also correct.  
 16 Q All right. Insofar as the food, the two beverage  
 17 tickets, wine, if it was served with dinner, and  
 18 then the staff help that helped put on this  
 19 function, did the employees contribute anything to  
 20 those items?  
 21 A Could you repeat that, please.  
 22 Q Sure. Did the employees pay for their food at this  
 23 function?  
 24 A No.  
 25 Q Did the employees pay or make a contribution of

1 A Of the specific one that I could remember I think  
 2 that the company would provide the meat. I know  
 3 we've done ribs and done a few different things of  
 4 that nature and the employees would kick in the  
 5 rest.  
 6 Q Bring a dish to pass, that type of thing?  
 7 A Yeah, that type of thing.  
 8 Q Might bring their own beverages?  
 9 A Yes, I imagine.  
 10 Q Insofar as the Christmas party, and let's just  
 11 focus on the December 4th of 1998 party, what was  
 12 the reason for putting on this party for your  
 13 employees?  
 14 A Well, I think it's pretty much -- what it had been  
 15 is to kind of sit back and take a time and let the  
 16 employees know you appreciate all their efforts.  
 17 Q Kind of a reward for the work of the previous year?  
 18 A Well, I don't think it's a reward. I think it's  
 19 more just a time where I personally or management  
 20 could express our appreciation for the efforts.  
 21 Q Would you --  
 22 A Helping us make us a success.  
 23 Q Would you agree that expressing appreciation in  
 24 this fashion would help morale, if you will, of the  
 25 employees?

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Page 17

1 money toward the two beverage tickets?  
 2 A No.  
 3 Q Did they make a contribution to the wine that may  
 4 or may not have been served with dinner?  
 5 A No.  
 6 Q Did they make a contribution to the salaries or  
 7 wages that were paid to the staff serving the meal?  
 8 A No.  
 9 Q Did they make a contribution to the salary or wages  
 10 paid to the bartender at the bar within the room?  
 11 A No.  
 12 Q Did UMI also, in addition to the contract price,  
 13 pay a tip?  
 14 A I thought it was inclusive.  
 15 Q You believe that any tip or gratuity that would  
 16 have been paid would have been included in the  
 17 price quoted?  
 18 A I believe so.  
 19 Q Was this the same type of function that was put on  
 20 from time-to-time in the summer? Meaning, UMI  
 21 would put on a summer function and then pay for  
 22 food for the employees or was it handled  
 23 differently?  
 24 A Well, I think it was handled differently.  
 25 Q How was it handled differently?

1 A I don't know about that. You know, it's just -- I  
 2 don't know because some would come, some wouldn't  
 3 come, some could make it, some couldn't make it.  
 4 So it was just making a time, taking -- making a  
 5 time available.  
 6 Q To -- as you said before, to show the  
 7 appreciation --  
 8 A Right.  
 9 Q -- for the work?  
 10 A Because I know we've had one guest would come, an  
 11 elderly lady, and she made the comment that she was  
 12 always looking forward if her friend would invite  
 13 her because she never got out for a dinner.  
 14 Q All right.  
 15 A So it's that type of a thing.  
 16 Q Was one of the purposes for this party to benefit  
 17 the employer/employee relationship --  
 18 MR. REID: Objection to form.  
 19 BY MR. BERTLING:  
 20 Q -- at UMI?  
 21 MR. REID: Object to form.  
 22 BY MR. BERTLING:  
 23 Q You can answer.  
 24 A I'm sorry.  
 25 MR. BERTLING: You can read it back.



1 (Above-pending question read.)  
2 THE WITNESS: It wasn't the purpose for  
3 which I had suggested these parties, it was just a  
4 time to respond to the efforts they had shown.  
5 BY MR. BERTLING:  
6 Q Would you agree that it would benefit the  
7 employee/employer relationship?  
8 MR. REID: Object to form.  
9 THE WITNESS: I don't know.  
10 BY MR. BERTLING:  
11 Q Does UMI-- strike that. As the president of UMI  
12 did you recognize any benefit to UMI that would  
13 arise from putting on these parties for your  
14 employees?  
15 A I don't think I can quantify it.  
16 Q Aside from quantifying it would you agree that  
17 there would be a benefit?  
18 MR. REID: Object to form.  
19 MR. MINGO: A benefit to the employer?  
20 BY MR. BERTLING:  
21 Q To the employer, UMI?  
22 A I don't know.  
23 Q Was that something that UMI -- strike that. Was  
24 that a desired result of these parties, in your  
25 mind, that you would -- that you would, as

1 A I don't recall. Maybe two or three.  
2 Q Do you recall the type of awards that were given  
3 out at this party?  
4 A Yes.  
5 Q What were they for?  
6 A Those were service awards, recognition of any  
7 employee that had been with us for five, ten,  
8 fifteen year tenures.  
9 Q And employee longevity such as you're describing is  
10 something that UMI wanted to reward by recognizing  
11 these people at these parties?  
12 A Well, you want to recognize that, yes.  
13 Q Because that's a benefit to have stable employees  
14 for UMI?  
15 A Well, it's always a benefit to have stable  
16 employees but it wasn't anything unique with  
17 choosing that event to recognize these employees.  
18 Q It's true, isn't it, that at this party, the  
19 December 4th of 1998 party, one of your goals in  
20 this was to sit down and talk with as many  
21 employees as possible?  
22 MR. MINGO: Goals?  
23 BY MR. BERTLING:  
24 Q And when I use "sit down," I'm using that as a  
25 metaphor. But it was one of your goals to talk

1 president of this company, receive some type of  
2 benefit from the employee in showing them this  
3 appreciation?  
4 A I never looked at it that way.  
5 Q Did you look at it as a way to increase employee  
6 loyalty to the company?  
7 A No.  
8 Q Did you look at it as a way to increase employee  
9 productivity for the company? Meaning, you are  
10 appreciating or showing appreciation for their  
11 previous years of work?  
12 MR. MINGO: I'll object to the form of  
13 the question.  
14 MR. REID: Join in that one.  
15 BY MR. BERTLING:  
16 Q Can you answer?  
17 A There's no -- I never saw a direct relationship and  
18 I don't see one now.  
19 Q It's true though at these parties awards were given  
20 out, correct?  
21 A I've done that once or twice, yes.  
22 Q In December of 1998, at this party, awards were  
23 given out to employees?  
24 A That's correct.  
25 Q How many awards?

1 with the employees at this party, correct?  
2 A Again, this is something we do to show our  
3 appreciation and you aren't going to do that by  
4 standing in a corner.  
5 Q Right.  
6 A So I would talk with the employees and get to meet  
7 their spouses or friends, yes.  
8 Q And it's true that one of your goals at the  
9 December 4th of 1998 party was to try to visit each  
10 table of employees, correct?  
11 A I guess I would probably characterize it as saying  
12 it was just a practice that I would try to meet as  
13 many and talk with as many as I could.  
14 Q And the reason for that would be what?  
15 A To show your appreciation for the efforts they've  
16 done.  
17 Q All right. Did other management personnel at UMI  
18 also try to visit each table?  
19 A I wouldn't know that.  
20 Q Were there any discussions before the Christmas  
21 parties, between management, that you would like to  
22 see members of management try to visit each table?  
23 A No, there was not.  
24 Q Did you have any discussions with management before  
25 these Christmas parties that you would like to see

<p style="text-align: right;">Page 22</p> <p>1 management interact with the employees as much as</p> <p>2 possible at these parties?</p> <p>3 A There was no discussion of that nature.</p> <p>4 Q I'm going to show you what's been marked as Exhibit</p> <p>5 2 for identification. Can you identify that</p> <p>6 exhibit? Can you identify that exhibit?</p> <p>7 A I believe this was a memo posted for all employees</p> <p>8 to make them aware of that date of December 4th.</p> <p>9 Q And this is a -- this memo bears a date of</p> <p>10 September 22nd of 1998?</p> <p>11 A Correct.</p> <p>12 Q And it's directed to all employees of UMI, of</p> <p>13 course?</p> <p>14 A Yes.</p> <p>15 Q And I think you told me at that time, back in</p> <p>16 December of 1998, UMI had approximately 40</p> <p>17 employees?</p> <p>18 A Correct.</p> <p>19 Q Does that include management as well?</p> <p>20 A Yes.</p> <p>21 Q And the memo of course makes reference to the UMI</p> <p>22 Christmas party?</p> <p>23 A Yes.</p> <p>24 Q And it specifies a date and time for the party?</p> <p>25 A Correct.</p>	<p style="text-align: right;">Page 24</p> <p>1 Q All right. It would be you, the two vice</p> <p>2 presidents and the four department heads?</p> <p>3 A Three or four, whatever. Yes.</p> <p>4 Q All right. And -- all right. The exhibit, Exhibit</p> <p>5 2, goes on in the body of its message to indicate</p> <p>6 to all employees, it says, "Keep the date of</p> <p>7 February 4th" -- I'm sorry, "Friday, December 4th,</p> <p>8 1998 open for the UMI Christmas party," correct?</p> <p>9 A Correct.</p> <p>10 Q The last sentence of that paragraph, we don't need</p> <p>11 to go through each sentence, but the last sentence</p> <p>12 indicates that "Wives, Husbands and guest are</p> <p>13 welcome," do you see where I'm at?</p> <p>14 A Yes.</p> <p>15 Q Was this party designed to be for the employee and</p> <p>16 one guest whether it's a spouse or somebody else?</p> <p>17 A Yes.</p> <p>18 Q Okay. Has there ever been an occasion -- well,</p> <p>19 strike that. Can you tell me whether the date of</p> <p>20 December 4th at any time before this party was</p> <p>21 cleared with the department heads or -- strike</p> <p>22 that, let me approach it this way. Can you tell me</p> <p>23 whether the date of December 4th of 1998 was</p> <p>24 cleared with the staff of UMI before that date was</p> <p>25 selected as the party?</p>
<p style="text-align: right;">Page 23</p> <p>1 Q And of course a location?</p> <p>2 A Uh-huh.</p> <p>3 Q Correct?</p> <p>4 A Correct.</p> <p>5 Q Who prepared this memo, do you know?</p> <p>6 A I don't know. I can assume it came out of human</p> <p>7 resources.</p> <p>8 Q Do you know who within human resources?</p> <p>9 A Beverly Butterfield.</p> <p>10 Q At the bottom of the memo there is an indication of</p> <p>11 who it's from and it says, "UMI staff," you see</p> <p>12 where I'm at?</p> <p>13 A Uh-huh.</p> <p>14 Q Is that -- say yes.</p> <p>15 A Yes.</p> <p>16 Q All right. The sentence right above that on</p> <p>17 Exhibit 2 says, "The UMI staff is looking forward</p> <p>18 to share this evening with you," correct?</p> <p>19 A Correct.</p> <p>20 Q Who is the UMI staff? What do you characterize as</p> <p>21 the UMI staff?</p> <p>22 A I'm sorry.</p> <p>23 Q What do you characterize as the UMI staff?</p> <p>24 A I think it was the people that we had referred to</p> <p>25 earlier, department heads, if you will.</p>	<p style="text-align: right;">Page 25</p> <p>1 A I don't know -- I guess I don't know what you mean</p> <p>2 by the word "cleared."</p> <p>3 Q Well, I guess I'm trying to find out --</p> <p>4 A You're really at the mercy of the place where</p> <p>5 you're having the party.</p> <p>6 Q I guess what I'm trying to find out here, can you</p> <p>7 ever remember a Christmas party where the staff,</p> <p>8 the people you identified previously, did not</p> <p>9 attend the party, the Christmas party I mean?</p> <p>10 A Can I recall a particular --</p> <p>11 Q Yes.</p> <p>12 A I can't recall a particular one but it certainly</p> <p>13 wouldn't surprise me that that would be the case.</p> <p>14 Q And I guess what I'm trying to find out here is if a</p> <p>15 member of the staff indicated, "I cannot make that</p> <p>16 party," would a different date be selected, do you</p> <p>17 ever recall that happening?</p> <p>18 A No, I do not.</p> <p>19 Q But on the other hand, you don't recall a specific</p> <p>20 party where a member of the staff was not present,</p> <p>21 correct?</p> <p>22 A I do recall one, yes.</p> <p>23 Q Okay. Which one would that be and the date, if you</p> <p>24 can tell me, please?</p> <p>25 A I don't remember the date but it was a picnic in</p>

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1 '98 'cause I wasn't there.  
2 Q How about the Christmas parties though, let's limit  
3 it to the Christmas parties?  
4 A I can't recall specific, no.  
5 Q I'm going to show you what is marked as Exhibit 3  
6 for identification. Can you identify that as --  
7 well, can you please identify that?  
8 A I believe this is a form that we would have  
9 distributed to the employees to help us in  
10 providing information to Silver Spring regarding  
11 menu choices.  
12 Q All right. And --  
13 A And the numbers that would attend.  
14 Q And of course this is a form bearing a date of  
15 November 6th of 1998?  
16 A Correct.  
17 Q And there is some additional information beyond  
18 that which was on the September 22nd of '98 notice  
19 and that specifically would be that cocktails are  
20 at six p.m. and dinner at seven; is that correct?  
21 A Yes.  
22 Q And then this form lists different selections that  
23 an employee may choose for their meal?  
24 A Yes.  
25 Q And it also, at the bottom, then has a portion that

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1 is to be detached and returned to Beverly  
2 Butterfield by November 20th; is that correct?  
3 A Correct.  
4 Q And that form that would be detached would contain  
5 information regarding whether the employee would or  
6 would not attend?  
7 A Correct.  
8 Q And it would contain information about what the  
9 employee would select for its meal?  
10 A Correct.  
11 Q And the guests?  
12 A Correct.  
13 Q And what the guests may select, correct?  
14 A Correct.  
15 Q There's also a portion on the form that would be  
16 detached to indicate that the employee is able to  
17 attend?  
18 A Correct.  
19 Q These forms were given out to each employee?  
20 A Yes.  
21 Q And would each employee, including management, fill  
22 out one of these forms?  
23 A Yes.  
24 Q The forms then would be returned or were to be  
25 returned to Beverly Butterfield by November 20th?

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1 A Correct.  
2 Q After she took the information from the forms do  
3 you know what happened to these forms?  
4 A I assume they were compiled and forwarded, the  
5 information was forwarded to Silver Spring.  
6 Q Insofar as the form itself though, the detached  
7 portion of it, do you know what happened to that?  
8 A No, I don't.  
9 Q Was there any record made of who would attend these  
10 parties other than providing information to Silver  
11 Spring?  
12 A Other than that I'm not aware, no.  
13 Q Beverly Butterfield would compile a list of who was  
14 going to attend a party prior to the party?  
15 MR. MINGO: You mean by individual name  
16 or number?  
17 MR. BERTLING: Yeah.  
18 BY MR. BERTLING:  
19 Q Name.  
20 A Not to my knowledge. I don't know.  
21 Q Was there any information kept, as far as you know,  
22 at UMI where a record would be kept track of who  
23 attended the parties and who didn't attend the  
24 parties?  
25 A Was any record kept?

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1 Q Right.  
2 A Not to my knowledge.  
3 Q All right. Let's talk about the physical layout of  
4 the party itself. We've already established the  
5 party occurred in the Tremont Room, correct?  
6 A Okay. Yes.  
7 Q All right. Has UMI used that specific room prior  
8 to the December 4th of 1998 party?  
9 A I don't -- wouldn't have -- I wouldn't know.  
10 Q You don't recall whether that happened or not?  
11 A No, I don't recall.  
12 Q Do you have --  
13 A That room was familiar, so.  
14 Q Now, as I understand it, for the party itself this  
15 room was, pursuant to the contract marked as  
16 Exhibit 1, booked solely for the use of UMI and its  
17 function, correct?  
18 A I believe that's correct.  
19 Q So between the times of six p.m. and closing, as  
20 indicated on Exhibit 1, that was the room set aside  
21 for the UMI function, correct?  
22 A Yes. Except for the conga line that came through  
23 from I don't know where.  
24 Q All right. And this party -- this room had a bar  
25 in it?

<p style="text-align: right;">Page 30</p> <p>1 A Correct.</p> <p>2 Q And the bar was staffed by a bartender?</p> <p>3 A I don't know. At least one, be maybe two, I don't</p> <p>4 know.</p> <p>5 Q All right. And in addition to that the room had</p> <p>6 tables set up for the employees to sit at and eat</p> <p>7 their meals?</p> <p>8 A Yes.</p> <p>9 Q Was there any head table set aside where you sat</p> <p>10 and other members of management sat?</p> <p>11 A No.</p> <p>12 Q So you sat at a table that was simply -- or that</p> <p>13 was similar to the tables sat at by everybody else?</p> <p>14 A Yes.</p> <p>15 Q At the door of this room, the Tremont Room, there</p> <p>16 was a check-in table set up, correct?</p> <p>17 A There was a table that had name cards on it, yes.</p> <p>18 Q And Beverly Butterfield was at that table?</p> <p>19 A Yes.</p> <p>20 Q And her husband, Robert Butterfield?</p> <p>21 A Yes.</p> <p>22 Q And Robert was helping Beverly check in people?</p> <p>23 A Correct.</p> <p>24 Q And I think you've indicated to me that the table</p> <p>25 at the door had some name cards on it?</p>	<p style="text-align: right;">Page 32</p> <p>1 beverages?</p> <p>2 A Yes.</p> <p>3 Q Can you tell me whether they received a place card</p> <p>4 for their table when they checked in or you just</p> <p>5 don't know if they did? Do you understand my</p> <p>6 question?</p> <p>7 A Yeah. I don't think we -- if you're asking were</p> <p>8 employees assigned to a table?</p> <p>9 Q Yeah.</p> <p>10 A No, they were not.</p> <p>11 Q Were they given a place card when they checked in</p> <p>12 that they could go and reserve a spot at a table on</p> <p>13 their own?</p> <p>14 A I think they were given the menu selection that</p> <p>15 they had chosen and that was about it.</p> <p>16 Q All right. So they were given a name tag and the</p> <p>17 menu selection?</p> <p>18 A Right.</p> <p>19 Q And the drink tickets?</p> <p>20 A Correct.</p> <p>21 Q Okay. And you don't know if there was a guest book</p> <p>22 to sign?</p> <p>23 A To my recollection there was not.</p> <p>24 Q And you don't know if there was a list that Beverly</p> <p>25 Butterfield had to check off names?</p>
<p style="text-align: right;">Page 31</p> <p>1 A Name tags, yes.</p> <p>2 Q And these were worn by the employees?</p> <p>3 A Correct.</p> <p>4 Q And their guests?</p> <p>5 A And their guests, correct.</p> <p>6 Q Were these cards already filled out with the</p> <p>7 employees' and their guests' name?</p> <p>8 A I don't know.</p> <p>9 Q Do you recall having to fill out a name tag</p> <p>10 yourself or was it already filled out when you</p> <p>11 arrived?</p> <p>12 A I don't recall.</p> <p>13 Q Okay. In addition to that did Beverly have a list</p> <p>14 that she would check as the people came to check</p> <p>15 off names of people who were registered to come to</p> <p>16 the party?</p> <p>17 A I don't know.</p> <p>18 Q Was there a guest book there were the people could</p> <p>19 sign in as they arrived?</p> <p>20 A Not to my knowledge.</p> <p>21 Q In addition to receiving a name tag the attendees</p> <p>22 at this party would receive a place card for their</p> <p>23 table selection or table location, I should say?</p> <p>24 A No.</p> <p>25 Q They would receive their tickets for the two free</p>	<p style="text-align: right;">Page 33</p> <p>1 A I don't know.</p> <p>2 Q This room, other than the conga line who came</p> <p>3 through, was not open to other public during the</p> <p>4 hours that UMI was having its function?</p> <p>5 A That's correct.</p> <p>6 Q Do you know how many people attended this party</p> <p>7 total?</p> <p>8 A No, I don't. I saw a number on one of these</p> <p>9 exhibits saying 65 but I don't know.</p> <p>10 Q Do you know how many employees attended the party?</p> <p>11 A No, I don't.</p> <p>12 Q Do you have any information as to the percentage of</p> <p>13 employees that attended this party? Do you</p> <p>14 understand my question?</p> <p>15 A I don't know. I mean, from memory I probably can</p> <p>16 recall who was there but I don't have a list of who</p> <p>17 attended and who didn't.</p> <p>18 Q With respect to the December 4th of 1998 party, can</p> <p>19 you tell me then from memory, as best you can, what</p> <p>20 percentage of employees attended?</p> <p>21 A I couldn't. I'd be guessing, I wouldn't have a</p> <p>22 clue.</p> <p>23 Q Can you tell me whether it was better than 50</p> <p>24 percent of the employees?</p> <p>25 A I wouldn't know.</p>



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1 Q All of the manage -- strike that. All of the staff  
2 were present?  
3 A I believe the answer is yes.  
4 Q All right. Insofar as the drink tickets, I think  
5 you testified earlier that each person was to get  
6 two beverage tickets?  
7 A I think it's even on here, isn't it?  
8 Q Yes.  
9 A Yes.  
10 Q What I said's correct, isn't it?  
11 A Correct.  
12 Q Did you receive more than two tickets at this  
13 party?  
14 A Yes, I did.  
15 Q And you got those from Robert Butterfield?  
16 A I believe so.  
17 Q He was again helping his wife, Beverly?  
18 A Correct.  
19 Q And it's my understanding that you received eight  
20 tickets?  
21 A Correct.  
22 Q Did anybody else in -- strike that. Did any other  
23 member of the UMI staff receive additional tickets?  
24 A Not to my knowledge.  
25 Q How did you come to receive those eight tickets?

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1 Did you go up to Mr. Butterfield and ask him for  
2 some additional tickets, do you recall?  
3 A I don't recall, no.  
4 Q Did anybody else on your behalf ask him for those  
5 additional tickets?  
6 A Anybody else on my behalf?  
7 Q Right.  
8 A No.  
9 Q Just trying to find out whether it would have had  
10 to have been you who asked for those tickets or  
11 whether you believe somebody else would have asked  
12 on your behalf?  
13 A No, I did.  
14 Q Excuse me?  
15 A I did.  
16 Q Did Mr. Butterfield question your request?  
17 A No.  
18 Q Now, the documentation we have before us indicates  
19 that the party began with cocktails at six p.m.,  
20 correct?  
21 A Yes.  
22 Q And it's indicated there that on Exhibit, I guess,  
23 3 specifically that dinner is at seven p.m.,  
24 correct?  
25 A Correct.

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1 Q Do you recall how the attendees were notified that  
2 dinner was about to begin, did somebody shout out,  
3 "Let's sit down for dinner," did somebody move  
4 about the room and kind of move people to the  
5 tables or can you give me some idea about that,  
6 please?  
7 A I believe that was pretty much controlled by Silver  
8 Spring Country Club.  
9 Q All right.  
10 A 'Cause they had a schedule and food was hot and I  
11 think, you know, with other rooms they were pretty  
12 diligent on maintaining a schedule.  
13 Q Do you recall Beverly Butterfield walking about the  
14 room moving people to the tables to get them to sit  
15 down for dinner?  
16 A I don't recall but it wouldn't surprise me. I  
17 mean, she certainly would be helpful in that.  
18 Q Did you help at all start dinner that way?  
19 A I don't recall.  
20 Q Now, this awards portion of the evening, was this  
21 before or after dinner?  
22 A Immediately after.  
23 Q And you were sitting at a table obviously, correct?  
24 A Yes.  
25 Q Who was at that table with you at the December 4th

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1 of 1998 party?  
2 A I don't recall.  
3 Q Members of the UMI staff?  
4 A I don't recall.  
5 Q Was there anybody else that you recall other than  
6 members of the UMI staff or management sitting with  
7 you at that table?  
8 MR. MINGO: Well, I'm going to object to  
9 the form of the question. Assumes staff was  
10 sitting with him, he said he doesn't recall.  
11 BY MR. BERTLING:  
12 Q Do you recall anybody else other than staff sitting  
13 with you?  
14 A Well, I mean, I don't recall who was at that table.  
15 Q Do you recall anybody who was --  
16 A Yes. The table was -- there were others at the  
17 table, yes.  
18 Q And who do you recall being at the table?  
19 A I don't recall anyone specifically.  
20 Q Now, how did the awards portion of the evening  
21 begin? Who decided it's time to give out the  
22 awards?  
23 A I would believe that I had made that decision based  
24 on the fact that everyone was -- you know, final,  
25 ending of eating the meal.

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1 Q So when it looks like everybody was pretty much  
2 done eating --  
3 A Right.  
4 Q -- and having dessert and whatever, the awards  
5 began?  
6 A Correct.  
7 Q And did you stand up and call out to get attention  
8 or how did that happen?  
9 A Yes.  
10 Q And what did you -- do you recall what you said, I  
11 mean, what kind of message you gave to these  
12 people, like, "Quiet everybody, it's time for the  
13 awards," or, "Listen," or something along those  
14 lines or can you give me some idea?  
15 A I can't recall specifically but probably along the  
16 lines of, "I want to thank everybody for being here  
17 and we have some awards to be presented," and we  
18 went from there.  
19 Q All right. What I'm trying to -- I'm trying to  
20 picture here how this occurred. Are you telling me  
21 then that you would have stood up from your table  
22 and got everybody's attention in some fashion?  
23 A Right.  
24 Q And when you got everybody's attention in the room  
25 did they quiet down and listen?

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1 A Yes.  
2 Q And so then you kind of had the floor for a little  
3 bit?  
4 A Right.  
5 Q And during that period of time, in addition to  
6 handing out the awards did you say a few words to  
7 the employees, thank them for the year or anything  
8 along those lines?  
9 A Probably, yes and happy holidays.  
10 Q Did you have a microphone to do this or just  
11 shouting it out, do you recall?  
12 A No. It's a small room, small group. I don't  
13 recall a microphone.  
14 Q So I'm trying to get here then a sense of the  
15 sequence. Did you start out by thanking everybody,  
16 saying a few words and then move to the awards?  
17 A Probably, yes.  
18 Q I think you said a little bit ago in your testimony  
19 that you handed out two or three awards?  
20 A Yes.  
21 Q Were all of these awards for longevity of service?  
22 A Either the five, ten, fifteen year, yes.  
23 Q And did you have something to give these employees  
24 who received the award at that party, at that time?  
25 A Yes.

1 Q A plaque or a trophy or can you describe what it  
2 was?  
3 A No. We give a gift certificate from a local  
4 jewelry store.  
5 Q And that gift certificate was paid for by UMI?  
6 A Correct.  
7 Q Is this something that was given out other years at  
8 Christmas parties for longevity of service?  
9 A Well, we've done it a number of ways, I don't know  
10 for how long. I know I've handed them out as well  
11 at the workplace.  
12 Q All right. Can you recall any Christmas party  
13 where after dinner -- well, strike that, let's not  
14 make it that limited. Can you recall any Christmas  
15 party prior to the December 4th of 1998 party where  
16 you did not stand up and say a few words, get  
17 everybody's attention and say a few words to the  
18 attendees?  
19 A I can't recall specifically but wouldn't surprise  
20 me if I did or did not.  
21 Q Besides yourself, on this December 4th of 1998  
22 party, did anybody else from the UMI staff say  
23 words -- say a few words to the gathering?  
24 A Not to my recollection.  
25 Q How long did the saying a few words and then

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1 handing out the awards take, if you recall?  
2 A Maybe five minutes.  
3 Q In addition to the two beverage tickets that were  
4 to be given out to persons who would attend the  
5 party, did this bar that was within the Tremont  
6 Room also accept cash?  
7 A I believe so.  
8 Q So employees and their guests were free to buy  
9 additional drinks if they wanted to?  
10 A Well, there's public bars as well at those  
11 facilities.  
12 Q Sure. But I'm focusing on the bar that was in the  
13 Tremont Room.  
14 A I didn't pay that much attention, I wouldn't know.  
15 Q So you don't know whether there was actually a cash  
16 bar functioning in there in addition to the  
17 tickets?  
18 A I don't know, correct.  
19 Q Now, I assume -- I'm pausing because you're looking  
20 at some of the exhibits and I want to give you a  
21 chance to do that.  
22 A Yeah. There's a statement on there that says cash  
23 bar, whatever that means.  
24 Q So you're referring to Exhibit 1 and there's a  
25 statement at the bottom under remarks --

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1 A Uh-huh.  
2 Q -- that a cash bar would be provided?  
3 A Right.  
4 Q Then based upon that was the bar within the Tremont  
5 Room a cash bar?  
6 A Yeah. That I don't know.  
7 Q I assume UMI gave no direction to their employees  
8 as to how they were to get to the Silver Spring  
9 Country Club?  
10 A I think there were a number of people that didn't  
11 -- were from, like, Waukesha or Slinger or whatever  
12 that didn't know where it was and we may have  
13 prepared a little map, yes.  
14 Q All right. So you may have handed out a map to  
15 those who needed it?  
16 A Correct.  
17 Q But it was your understanding, of course, intention  
18 that a person attending the party was responsible  
19 for getting themselves to the party on their own,  
20 correct?  
21 A Correct.  
22 Q It's clear from these documents and the existence  
23 of a cash bar that there was to be some drinking,  
24 to whatever extent, going on at the party, drinking  
25 of alcoholic beverages, correct?

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1 A It was available there, yes.  
2 Q Did anyone on behalf of UMI make any arrangements  
3 to provide transportation to those who may drink  
4 too much at this party to get them home safely?  
5 A Were any arrangements made prior?  
6 Q Right.  
7 A I'm not sure I understand.  
8 Q Right. Prior to the party --  
9 A Were there any arrangements made?  
10 Q Right.  
11 A Not to my knowledge, no.  
12 Q Did you ever in your -- did you ever think about  
13 providing or offering transportation to those who  
14 may overindulge in alcohol at these parties, prior  
15 to this party?  
16 A I guess being a small group and having done this we  
17 -- nothing occurred to make me think in those  
18 directions, so.  
19 Q I guess then --  
20 MR. MINGO: Were you done with your  
21 answer?  
22 BY MR. BERTLING:  
23 Q Yeah, I don't mean to cut you off ever. If I ever  
24 do, you tell me.  
25 A So, I mean, that doesn't preclude the fact that we

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1 would have given assistance should it ever have  
2 arisen.  
3 Q All right. So to follow up on your answer, you  
4 don't recall, prior to this party, thinking in your  
5 mind that arrangements should be considered for  
6 someone who may have overindulged at one of these  
7 parties on alcohol?  
8 A Well, we were at a public place --  
9 Q Uh-huh.  
10 A -- and we, as a company, were limiting that  
11 possibility through the use of beverage tickets.  
12 So beyond that, no, we did not.  
13 Q Okay. But then to follow up on your last answer,  
14 is it your testimony that had you become aware of  
15 someone at the party drinking too much that  
16 arrangements would have been made to drive that  
17 person home safely?  
18 A That type of an offer would have been made, yes.  
19 Q And it would have been made by UMI staff to its  
20 employees who may have overindulged had that been  
21 something known?  
22 A Well, by people -- responsible people that would  
23 have been there, yes.  
24 Q And that would have included yourself, of course?  
25 A Yes.

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1 Q In any prior gathering at UMI are you aware of any  
2 employee needing to be driven home by another  
3 attendee at the party because of the fact that that  
4 employee may have drank too much alcohol?  
5 A Only after the fact.  
6 Q After this accident in this case?  
7 A No. After the fact where that had occurred that  
8 someone had driven someone home.  
9 Q All right. So this occurred at a prior party  
10 before this December 4th of '98?  
11 A Correct.  
12 Q Was it a Christmas party?  
13 A I believe so.  
14 Q And when you say, "after the fact," then you say  
15 you learned about this occurring after the ride  
16 home was given but before December 4th of '98?  
17 A Right.  
18 Q Who was that individual that needed the ride home?  
19 A I believe it was Mike Divine.  
20 Q Who gave him the ride home?  
21 A That I'm not sure.  
22 Q Who do you believe gave him the ride home even  
23 though you're not sure?  
24 A I believe, from what I've heard, it was John  
25 Kreuser.

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<p>1 Q Was this Christmas party the '97 party?</p> <p>2 A No.</p> <p>3 Q Can you tell me which year it would have been?</p> <p>4 A Three, four years prior.</p> <p>5 Q And how did you learn this occurred after the fact?</p> <p>6 A Someone told me.</p> <p>7 Q Do you recall who told you?</p> <p>8 A No.</p> <p>9 Q You ever talk to John about that, John Kreuser,</p> <p>10 before the December 4th of '98 party?</p> <p>11 A Not that I recall.</p> <p>12 Q You were informed though prior to the December 4th</p> <p>13 of '98 party that Mike Divine was given a ride home</p> <p>14 because he drank too much at the party?</p> <p>15 A At a party, yes.</p> <p>16 Q Are you aware of that occurring at any other</p> <p>17 function involving Mike Divine?</p> <p>18 A No.</p> <p>19 Q Any other employee need similar assistance that</p> <p>20 you're aware of?</p> <p>21 A No.</p> <p>22 Q Did you have any discussions with Mike Divine about</p> <p>23 that after it occurred?</p> <p>24 A I don't recall specifically, no.</p> <p>25 Q Do you recall generally?</p>	<p>1 party that Michael Divine could drink again to</p> <p>2 excess --</p> <p>3 A Right.</p> <p>4 Q -- and need a ride home at the December 4th of 1998</p> <p>5 party, correct?</p> <p>6 A Correct.</p> <p>7 Q And I guess what I'm just trying to find out is are</p> <p>8 you saying that it did not occur to you prior to</p> <p>9 that party?</p> <p>10 A It seems like that's what I had said previously.</p> <p>11 Q All right. On the previous occasion when John</p> <p>12 Kreuser gave Mike Divine a ride home is that</p> <p>13 something that you believed was a responsible</p> <p>14 action by John Kreuser?</p> <p>15 A Was responsible?</p> <p>16 Q Yes.</p> <p>17 A Yes.</p> <p>18 Q Was a responsible action on his part?</p> <p>19 A I think that he had to make that judgment call and</p> <p>20 I think John has good judgment, yes.</p> <p>21 Q Is John the -- or was John, Mike Divine's</p> <p>22 supervisor?</p> <p>23 A No.</p> <p>24 Q Did Mike Divine work in his department?</p> <p>25 A No.</p>
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<p>1 A No, I don't.</p> <p>2 Q Because that occurred prior to the December 4th of</p> <p>3 1998 Christmas party, did it occur to you that it</p> <p>4 could occur again at the December 4th of 1998</p> <p>5 Christmas party with respect to Mike Divine?</p> <p>6 A Boy, that takes a lot of presumptions on my part or</p> <p>7 anybody's part and I don't -- I don't think I could</p> <p>8 answer that.</p> <p>9 Q Can you tell me whether it occurred to you prior to</p> <p>10 this party?</p> <p>11 A Whether it occurred to me, no.</p> <p>12 Q Are you saying it didn't or you just don't recall</p> <p>13 it occurring to you? I'm trying to just clarify as</p> <p>14 best I can your answer to this question?</p> <p>15 A I'm sorry. What was that?</p> <p>16 Q Sure. Can you tell me whether it didn't occur to</p> <p>17 you that it could happen again or you don't recall</p> <p>18 whether it occurred to you? It's a fine line but</p> <p>19 I'm just trying to find out if you can answer that</p> <p>20 question.</p> <p>21 A There's too many negatives there. I don't think I</p> <p>22 follow that.</p> <p>23 Q All right. I think you testified a moment ago you</p> <p>24 don't -- you can't say specifically whether it</p> <p>25 occurred to you prior to the December 4th of 1998</p>	<p>1 Q Which department did Mike Divine work in?</p> <p>2 A In manufacturing.</p> <p>3 Q Okay. And who was the head of that department?</p> <p>4 A Al Kreuser.</p> <p>5 Q That's John's brother?</p> <p>6 A Yes.</p> <p>7 Q When you understood that John gave Mike Divine a</p> <p>8 ride home from this previous party, was it your</p> <p>9 understanding that he did that on behalf of UMI, as</p> <p>10 one of the UMI staff?</p> <p>11 MR. MINGO: I'll object as calling for</p> <p>12 speculation on the witness's behalf.</p> <p>13 MR. REID: Can you read the question</p> <p>14 back? Sorry, I missed it.</p> <p>15 (Above-pending question read.)</p> <p>16 MR. REID: I'll join in Mark's objection.</p> <p>17 THE WITNESS: I don't believe John was a</p> <p>18 member of the "staff" at that time.</p> <p>19 BY MR. BERTLING:</p> <p>20 Q All right. When did John become a member of the</p> <p>21 "staff" that we've identified?</p> <p>22 A John's a very talented person. He's been with us</p> <p>23 and left us a number of times and I think he</p> <p>24 assumed the position of manager of engineering</p> <p>25 within the last three years.</p>



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1 Q Okay. So you're talking about 1996, approximately?  
2 A The past three years, approximately.  
3 Q Prior to that how was he employed at UMI, prior to  
4 becoming a member of the "staff" that we've  
5 identified?  
6 A Well, John has been -- I don't even remember.  
7 Originally I think in estimating, he's been in  
8 sales. As I said he's a talented individual.  
9 Q What was his position just before becoming head of  
10 the engineering department?  
11 A I believe he was an account manager in sales.  
12 Q Do you believe he was an account manager in sales  
13 when he gave Mr. Divine this ride home from the  
14 previous party?  
15 A I don't know.  
16 Q Prior to the December 4th of 1998 party were you  
17 aware of any information that indicated to you that  
18 Mike Divine had a drinking problem, struggled with  
19 drinking?  
20 A No, I did not.  
21 Q Are you aware of any occasion prior to the December  
22 4th of 1998 party where he went out at lunch and  
23 had a beer or two?  
24 A Well, I think I testified to that that two  
25 individuals -- two employees apparently had done

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1 that because I had smelled beer on one individual  
2 -- one employee's breath and confronted them.  
3 Q Was that employee Mike Divine?  
4 A Sorry?  
5 Q Was that employee Mike Divine?  
6 A No, it was not.  
7 Q Was Mike Divine the other employee involved in  
8 that?  
9 A Correct.  
10 Q And how did you then learn that Mike Divine had, I  
11 guess, drank beer at lunch?  
12 A Well, I confronted both of them and they told me.  
13 Q When was that in relation to the December 4th of  
14 1998 party?  
15 A Oh, gosh. I don't know.  
16 Q Was it within a year of 1998 or prior?  
17 A I don't recall.  
18 Q Are you aware of whether Mike Divine had his  
19 license revoked or suspended prior to December 4th  
20 of '98 for operating while intoxicated?  
21 A No, sir.  
22 Q Are you aware of whether Al Kreuser gave him rides  
23 to work because he didn't have a license due to the  
24 fact that he had them suspended or revoked for  
25 operating without --

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1 A I think I learned that after the fact, yeah.  
2 Q All right. So you were aware after the fact of  
3 this accident in this case?  
4 A No. After the occurrence.  
5 Q All right. Sometime prior to December 4th of 1998  
6 you learned then that Al Kreuser gave rides to Mike  
7 Divine because Mike Divine did not have a license  
8 due to operating while intoxicated; is that  
9 correct?  
10 A No.  
11 Q All right. Tell me what you learned after the  
12 fact?  
13 A What I know was that Mike Divine, when he started  
14 working for UMI, did not have a license and that Al  
15 Kreuser was giving him rides to work.  
16 Q To and from work or just to work?  
17 A I believe so, I don't know.  
18 Q All right. And you learned of that prior to  
19 December 4th of '98?  
20 A Yes. I learned about that during that initial time  
21 period when Mr. Divine started working for us.  
22 Q And when was that?  
23 A I think it was either -- sometime in '90 or '91.  
24 Q And when you learned of this did you learn why Mike  
25 Divine did not have a license?

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1 A No, I did not.  
2 Q Have you ever learned of why Mike Divine did not  
3 have a license at that time?  
4 A I think after all of this, I think it's been part  
5 of the testimony.  
6 Q All right. So you mean after the accident in this  
7 case?  
8 A After the December 4th, yes.  
9 Q How did you learn of Al Kreuser giving a ride to  
10 and from work to Mike Divine?  
11 A He probably told me.  
12 Q Okay. Did he -- and I guess you've already  
13 answered this but you don't recall him explaining  
14 to why you Mike needed the ride?  
15 A No, I don't.  
16 Q Did Mike Divine come to you prior to the December  
17 4th of 1998 and ask for a loan of \$500?  
18 A This is the time period we're talking about here in  
19 '90 or '91.  
20 Q And did he ask you personally for a loan or the  
21 company for a loan?  
22 A I believe he asked the company for a loan.  
23 Q And did he make this request to you?  
24 A Yes.  
25 Q Did he explain to you why he needed this loan?

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1 A To -- for some testing, whatever the requirements  
2 are to get his license returned.  
3 Q Did he get this loan from the company?  
4 A No, he did not.  
5 Q Did you ask him why he didn't have a license?  
6 A I don't recall if I asked him specifically why, no.  
7 Q Well, you answered that by saying you don't recall  
8 specifically asking him. Do you recall -- do you  
9 have a recollection, in a general sense, talking to  
10 him about that?  
11 A I really don't, no.  
12 Q So if I understand what you're testifying to, he  
13 came to you and asked for a \$500 loan to get his  
14 license back?  
15 A Uh-huh.  
16 Q Is that correct?  
17 A Yes.  
18 Q And you don't recall him explaining to you why he  
19 did not have a license while he made this request  
20 to you?  
21 A No, I don't.  
22 Q Do you recall asking him why he didn't have his  
23 license?  
24 A I don't recall but I don't think I would have  
25 because it was moot, we weren't going to do it.

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1 Q Oh. During this one conversation then is it your  
2 testimony that you told him there would be no loan?  
3 A Correct.  
4 Q So you didn't consider it for a period of time?  
5 A Well, our policy is for loans is it's buying a  
6 home, college education, medical emergency, things  
7 -- the four things that are identical to what an  
8 IRA loan is granted.  
9 Q All right. So applying that criteria his request  
10 didn't qualify?  
11 A Correct.  
12 Q You testified, going back to a point we talked  
13 about a few minutes ago, that after the fact but  
14 before the December 4th of 1998 party you became  
15 aware of Mike getting a ride home because he drank  
16 too much at a Christmas party, correct?  
17 A That's correct.  
18 Q Were you at that Christmas party?  
19 A I believe so.  
20 Q Did you notice Mike Divine intoxicated at that  
21 party?  
22 A I don't recall, no.  
23 Q Have you ever noticed Mike Divine intoxicated at  
24 any Christmas party prior to the December 4th of  
25 1998 party?

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1 A I don't recall anyone ever being in such a  
2 condition.  
3 Q At any of these parties?  
4 A At any of the parties.  
5 Q And I guess to just jump ahead to the December 4th  
6 of 1998 party, do you recall anything that Mike  
7 said or did that evening which indicated to you  
8 that he was intoxicated?  
9 A No, sir.  
10 Q Did he say or do anything that indicated to you  
11 that he was under the influence of alcohol?  
12 A No, sir.  
13 Q From the start to the finish of the evening did he  
14 appear completely normal to you?  
15 A Yes.  
16 Q When is the last time you saw Mike Divine that  
17 evening? I'm looking for what time.  
18 A I don't know the timing -- the time, you know, but  
19 it was immediately after dinner when he kind of  
20 collared me, if you will.  
21 Q All right. You saw him interact with Herb Nash  
22 when Herb Nash received his award, right?  
23 A Right.  
24 Q Just describe for me what you saw?  
25 A Well, you know, Mike had -- he was an outgoing

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1 personality, he wanted to make a show. I mean,  
2 that was typical of who Mike was. And this  
3 individual, Herb Nash, had been talking about  
4 retirement for a number of years. I don't know his  
5 age but I know he isn't, you know, 65. But Mike  
6 was making a show out of helping the old man up to  
7 the table to get his award, to give him assistance.  
8 And he kind of got everybody's attention and  
9 everybody, you know, cheered and laughed and that's  
10 what he was looking for.  
11 Q Anything that he'd do in that regard, Mike I mean  
12 now, Mike Divine, indicate to you that he was under  
13 the influence of alcohol at that point?  
14 A This was Mike Divine acting out, in my opinion.  
15 Q All right. Then I thought you told me a moment  
16 ago, or I think you told me a moment ago that he  
17 collared you at some moment that evening?  
18 A Yes.  
19 Q Was that after the Herb Nash deal?  
20 A Right. Right after dinner.  
21 Q Just tell me about that, what happened?  
22 A I remember him coming up to me and saying, "Where  
23 are we going," and, you know. I didn't know if he  
24 wanted to go someplace or whatever but what he was  
25 asking was what is the company doing to grow. And

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1 he was the type of worker, if he had five automatic  
2 machines around him he would make certain they all  
3 were operating and he was always after getting  
4 another automatic saw or something of that nature  
5 to be more productive or what have you. So that  
6 was the context that he -- of his question.  
7 Q And what time did this occur?  
8 A Immediately after dinner.  
9 Q Dinner's at seven?  
10 A 8:15.  
11 Q Did he come up to you or did you go up to him?  
12 A It probably was one of those in passing type  
13 things.  
14 Q How long did you talk to him?  
15 A A few minutes.  
16 Q Less than five?  
17 A Well, I would think so.  
18 Q How did he appear at that point?  
19 A He appeared fine.  
20 Q Appeared normal?  
21 A For Mike Divine, yes.  
22 Q Did you notice anything about him that indicated to  
23 you that he had been drinking at all that evening?  
24 A No, I didn't.  
25 Q Did he have a drink with him at that time?

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1 A I don't recall if he did or not.  
2 Q Did you, after dinner, move about the room then and  
3 attempt to visit each table?  
4 A Yes, I did.  
5 Q And were you successful in visiting with each  
6 table, as best you can recall?  
7 A I would hope so but I don't recall exactly.  
8 Q When you moved around the room and did this, did  
9 you do it alone or was anybody with you,  
10 accompanying you?  
11 A I did it alone.  
12 Q Okay. We talked about your meeting with Mike  
13 Divine at about 8:15 p.m. Did you have any other  
14 conversations with him for the remainder of the  
15 evening?  
16 A No, I did not.  
17 Q What time did you leave the Tremont Room on  
18 December 4th of '98?  
19 A About 11 o'clock.  
20 Q Was there anybody else in the room when you left?  
21 A There were six of us in total from UMI in the room.  
22 Q And who would they be?  
23 A That was my wife, my son and his wife, and a friend  
24 of ours and his wife.  
25 Q The friend of yours, was that friend an employee of

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1 UMI?  
2 A No.  
3 Q Anyway related to UMI?  
4 A No.  
5 Q Was invited as a guest of yours?  
6 A Yes.  
7 Q Was there Silver Spring staff in the room at that  
8 point?  
9 A There must have been, yes.  
10 Q Anybody else in the room then besides these six UMI  
11 individuals and Silver Spring staff?  
12 A To the -- that's it, to the best of my  
13 recollection.  
14 Q Do you have a recollection of when Mike Divine left  
15 the room?  
16 A No, I don't.  
17 Q Is it your testimony that the last time you recall  
18 him being in the room was during this conversation  
19 at 8:15?  
20 A That's the last time that I had seen him in the  
21 room, yes, to my recollection.  
22 Q The bar that was in the room, did it have stools or  
23 chairs around it or was it simply that you could  
24 stand around?  
25 A I believe it was something -- I don't believe there

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1 were any stools there, no. Not in that room.  
2 Q Do you have a recollection of seeing Mike Divine  
3 drink at all at any point after this 8:15  
4 conversation?  
5 A I didn't see him, so I don't know.  
6 Q Did anybody come up to you at any time during the  
7 December 4th of '98 party and indicate anything to  
8 you about the extent of Mike Divine's drinking that  
9 evening?  
10 A No, sir.  
11 Q Are you aware from investigation after the accident  
12 involved in this case that his blood alcohol  
13 content exceeded .3?  
14 A Yes.  
15 Q Did you see any indication on any of his -- strike  
16 that. Did you see anything about him that evening  
17 that indicated to you that he had drank to that  
18 extent?  
19 A Not when I had seen him, no.  
20 Q Okay. Had you been aware of the extent of his  
21 drinking that evening, would you have made  
22 arrangements for him to have someone drive him home  
23 or at least drive him from the party?  
24 MR. REID: Object as speculation.  
25 THE WITNESS: I think as with any

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1 employee I would have concern and I would have  
2 certainly done what I could. That doesn't mean  
3 you're always successful.  
4 BY MR. BERTLING:  
5 Q When you say, "done what you could," you mean you  
6 would have done what you could have to have  
7 prevented him from driving from the Silver Spring  
8 Country Club?  
9 A I think that's a fair statement, yes.  
10 Q When you left the Tremont Room at 11 o'clock did  
11 you see Mike Divine anywhere else in the Silver  
12 Spring Country Club facility?  
13 A No.  
14 Q Did you see him again after that?  
15 A No.  
16 Q How did you become aware of the accident in this  
17 case?  
18 A I received a phone call from Al Kreuser on Saturday  
19 morning, the 5th.  
20 Q Do you recall the content of that conversation?  
21 A Just that he had a bad car accident and was killed.  
22 Q Do you recall anything else that was discussed  
23 during that phone call?  
24 A I really don't. That was a shocker.  
25 Q Did you make any phone calls then on Saturday

1 the party?  
2 A I don't recall. I don't know if we knew what the  
3 cause of the accident was at that point.  
4 Q John Kreuser was at that meeting?  
5 A I'm assuming he was.  
6 Q Do you recall any discussion about how much Mike  
7 Divine may have drank that evening at that staff  
8 meeting between anybody there?  
9 A Again, I don't know that we knew at that point what  
10 was the cause of it.  
11 Q Sure. But no discussion about alcohol?  
12 A Not to my recollection.  
13 Q Was there a meeting that week later with the  
14 employees?  
15 A I don't recall.  
16 Q Do you recall having a meeting with the employees?  
17 A Yes.  
18 Q When did that occur?  
19 A That I don't recall --  
20 Q Okay.  
21 A -- when. It was obviously sometime after that but  
22 I don't recall.  
23 Q Was this with all the employees?  
24 A Yes.  
25 Q And did you lead the meeting?

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1 morning after receiving that news?  
2 A Not that I recall.  
3 Q Do you recall calling Beverly Butterfield?  
4 A I don't know.  
5 Q Do you recall talking to -- calling anybody else on  
6 that Saturday to notify them of this accident?  
7 A No, I don't recall.  
8 Q How about on Sunday?  
9 A No.  
10 Q It's my understanding that there was a meeting at  
11 UMI the following week with employees regarding  
12 this, do you recall that or not?  
13 A No, I don't. We had a staff meeting on Monday  
14 morning but not with all the employees, no.  
15 Q The staff meeting on Monday morning, when you say  
16 staff, is it including then yourself, the two vice  
17 presidents and the department heads?  
18 A Correct.  
19 Q And is this a weekly, normal meeting or was it  
20 specifically because of the accident?  
21 A Regular.  
22 Q The accident was discussed?  
23 A Yes.  
24 Q Was there any discussion during that meeting about  
25 the extent of Mr. Divine's drinking that evening at

1 A Yes.  
2 Q And the purpose for the meeting?  
3 A Well, I think we were requesting or the police were  
4 requesting -- Menomonee Falls Police Department was  
5 requesting information and so on and I made it  
6 clear that that would occur. I think this may have  
7 been in -- now that I think about it, December  
8 20th, some time period that we had given them a  
9 list of our employees and that they would probably  
10 be calling them for information and asked them to  
11 be cooperative and share whatever they knew.  
12 Q You recall -- was there anything else discussed at  
13 this meeting other than that general information as  
14 you've described for me?  
15 A No.  
16 Q Okay. In addition to that meeting did anyone from  
17 your insurance company, Western --  
18 MR. REID: West America.  
19 BY MR. BERTLING:  
20 Q -- West America Insurance Company meet with  
21 employees within a month of the accident?  
22 A Well, our insurance company is Ohio Casualty.  
23 Q Okay. Anybody from Ohio Casualty meet with  
24 employees within a month of the accident?  
25 A I don't know the time period but an individual did



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1 interview the employees, yes.  
2 Q That's Jim Becker?  
3 A I don't know.  
4 MR. REID: Just to clarify for everybody,  
5 West America is one of the Ohio Casualty Companies,  
6 so that we're all talking about the same entity.  
7 BY MR. BERTLING:  
8 Q Have you ever received -- seen and reviewed the  
9 results of the Ohio Casualty agent's interviews  
10 with employees?  
11 A No, I have not.  
12 Q In December of 1998 the corporate attorneys for UMI  
13 were an Attorney Wagner and then an Attorney Roger  
14 Pyzyk from Menomonee Falls?  
15 A Well, our corporate attorney that we've used for  
16 some time is Roy Wagner, yes.  
17 Q And Roy Wagner is from Menomonee Falls?  
18 A Yes.  
19 Q Did -- do you know if Beverly Butterfield and  
20 Robert Butterfield were informed that Mr. Wagner or  
21 Mr. Pyzyk would represent them with respect to any  
22 matters associated with this accident free of  
23 charge to them?  
24 A No.  
25 Q The attorneys, Roy Wagner and -- strike that. Roy

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1 Wagner was paid as a corporate attorney in December  
2 of '98?  
3 A Correct.  
4 Q It's my understanding he was present when some of  
5 the police interviews took place?  
6 A Correct.  
7 Q He was there as the corporate attorney?  
8 A Yes.  
9 Q Do you know whether Mr. Butterfield was informed  
10 not to speak to the police unless Mr. Wagner was  
11 present?  
12 A No, I don't know.  
13 Q Was an offer made to --  
14 A Not by me, if you're asking that.  
15 Q Sure. Was an offer made to Beverly Butterfield  
16 that Mr. Wagner would represent her at company  
17 expense?  
18 A No.  
19 Q Not by you?  
20 A No.  
21 Q Do you know if anybody made that comment to her?  
22 A I don't know if anybody else did but it wasn't --  
23 it wasn't I.  
24 Q How about the same question regarding Robert  
25 Butterfield. Was an offer made to Robert

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1 Butterfield that Attorney Wagner would represent  
2 him at company expense?  
3 A I don't believe so, no.  
4 Q That you don't believe occurred?  
5 A Correct.  
6 Q 'Cause Robert Butterfield was not an employee of  
7 UMI, correct?  
8 A Correct.  
9 Q How about John Kreuser, was an offer made to him  
10 that Mr. Wagner would represent him at company  
11 expense?  
12 A Not that I -- not that I recall, no.  
13 Q The police eventually interviewed yourself and John  
14 Kreuser?  
15 A Yes.  
16 Q And Attorney Wagner was present?  
17 A Yes.  
18 Q And also Roger Pyzyk?  
19 A Correct.  
20 Q Is Roger a partner or an associate of Roy Wagner?  
21 A No --  
22 Q Same firm?  
23 A -- he's not.  
24 Q Mr. Pyzyk was the attorney during that meeting for  
25 whom?

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1 A He was representing Universal Metrics for the  
2 inquest for the purpose of the pending inquest.  
3 Q And Mr. Wagner was representing who at that meeting  
4 with the police?  
5 A Well, he was our corporate attorney.  
6 Q Okay. So both attorneys were there on behalf of  
7 UMI?  
8 A Yes.  
9 MR. BERTLING: Just take a quick look  
10 here I think those are all the questions I've got.  
11 We can go off the record for a minute if you don't  
12 mind. I just want to take a look at my notes. We  
13 might be done.  
14 (Discussion off the record.)  
15 MR. BERTLING: Okay. Just got a couple  
16 questions, couple more.  
17 BY MR. BERTLING:  
18 Q Are you aware of any lists that currently exist  
19 that would show the -- or identify the names of the  
20 employees that attended this party in December of  
21 1998?  
22 A No, I'm not.  
23 Q Was there a meeting between your corporate  
24 attorneys, Mr. Pyzyk or Mr. Wagner and other UMI  
25 employees about a week before the inquest in this

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1 case?

2 A I believe that that is the case.

3 Q Was this a meeting with all employees or just

4 specific employees?

5 A That I do not know.

6 Q Were you present at that meeting?

7 A No, I was not.

8 Q Was this a meeting with Attorney Pyzyk?

9 A I believe it was Mr. Pyzyk that was representing us

10 in the inquest, of course, and his plan or

11 whatever, yes.

12 Q Was Mr. Wagner there, Roy Wagner?

13 A I don't know.

14 Q And Mr. Pyzyk was, as you've said, the corporate

15 attorney at this meeting?

16 A He was representing us at the inquest, yes.

17 Q So he was paid by the corporation?

18 A Yes, sir.

19 Q And I think, if I asked you this I apologize, was

20 this a meeting with all employees or just a certain

21 number of employees?

22 A I don't know that.

23 Q With only those employees who were subpoenaed to

24 the inquest?

25 A I don't know that. I'm assuming that's the case

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1 but I don't know.

2 Q And did this meeting take place at UMI?

3 A I don't know. I believe again that's the case but

4 I'm not certain.

5 MR. BERTLING: Those are all the

6 questions I've got.

7 MR. REID: I do have a few.

8 EXAMINATION

9 BY MR. REID:

10 Q What's UMI's business address?

11 A N60 W16590 Kohler Lane, with a K.

12 Q How far is that from Silver Spring Country Club?

13 A How far?

14 Q Yes.

15 A In what terms?

16 Q Number of miles.

17 A Within ten.

18 Q You said the business of the company is the

19 fabrication and distribution of metric problems?

20 A Metric, yeah, fasteners.

21 Q Can you describe for us in more detail what those

22 are and what use they're put to?

23 MR. MINGO: I'll object to this as being

24 irrelevant, immaterial and not designed to lead to

25 any discoverable evidence. Subject to that go

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1 ahead and answer.

2 BY MR. REID:

3 Q I'm a layperson; when you say "metric products,"

4 I'm not sure what you mean?

5 A Metric fasteners, nuts, bolts, washers, things of

6 that nature, fasteners.

7 Q Was the December 4, 1998 party attended exclusively

8 by employees in addition to spouses and social

9 guests of employees?

10 A And two friends that I had invited, yes.

11 Q Two social friends?

12 A Yes. And business friends as well.

13 Q Party was on a Friday evening?

14 A Correct.

15 Q I presume at the meeting there were no operations

16 performed? You didn't have any product displays

17 there, for instance?

18 A We did not have any product displays there,

19 correct.

20 Q Does the company have a board of directors?

21 A Yes.

22 Q Who's on the board of directors?

23 A Myself and my wife.

24 Q And does the company have a treasurer?

25 A Yes.

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1 Q Who is that?

2 A Either myself or my wife.

3 Q Same with secretary?

4 A Yes.

5 Q And offices of president and vice presidents you've

6 already described. Are there any other officers

7 besides the president, vice presidents, secretary

8 and treasurer?

9 A No, sir.

10 Q Anything you know about any conversation Mr.

11 Kreuser had that evening with Mr. Divine about Mr.

12 Divine getting a ride away from Silver Spring is

13 something you have no knowledge of, would that be a

14 fair statement?

15 A Are you -- there's two or three -- I don't know how

16 many Kreusers but there's at least two.

17 Q By John.

18 A Do I have -- would you please repeat that?

19 Q Sure. I presume John Kreuser's going to be asked

20 questions in his deposition immediately following

21 yours about conversations he and Mr. Divine may

22 have had about getting Mr. Divine a ride home that

23 evening. Do you have any knowledge, any first-hand

24 knowledge about what happened in that regard?

25 MR. FREDERICKS: I'm going to object to

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1 the form.  
2 MR. MINGO: I'm going to join in the  
3 objection.  
4 MR. FREDERICKS: Go ahead.  
5 THE WITNESS: The only knowledge I have  
6 is the testimony that's been entered into the  
7 public record.  
8 MR. REID: That's all I have.  
9 MR. ANDRES: No questions.  
10 MR. BERTLING: I have a couple follow up.  
11 Sorry, but they are only a couple.  
12 EXAMINATION  
13 BY MR. BERTLING:  
14 Q Just two things I want to follow-up on. I think in  
15 response to a question just given now you indicated  
16 that -- you made a distinction of having social  
17 friends of yours at the party and I think you said  
18 business friends as well. Did I --  
19 A They're one in the same, they are both.  
20 Q Okay. What do you mean by "business friends"?  
21 A Someone who has helped me in business and become a  
22 social friend that we associate with.  
23 Q And then when you say helped you in business, you  
24 mean helped you in business as UIM -- I'm sorry,  
25 UMI, correct?

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1 A In advising, yes.  
2 Q What was the -- what's this person's profession? I  
3 don't know if I need his name yet.  
4 A He's an engineer.  
5 Q And when you say "advising," he would provide  
6 advice to UMI regarding their products?  
7 A He's primarily in the construction business so it  
8 relates to building projects and things of that  
9 nature.  
10 Q Building projects of UMI?  
11 A Physical plant, yes.  
12 Q Was he hired by UMI to do that at some point in  
13 time --  
14 A Yes.  
15 Q -- prior to this party?  
16 A Yes.  
17 Q Was he still in the process --  
18 A No.  
19 Q -- of advising --  
20 A No.  
21 Q -- at the time of the party?  
22 A No.  
23 Q Did he pay for his meal at the party?  
24 A No.  
25 Q Did he get two free drink tickets?

Page 7

1 A Yes.  
2 Q So he had the same agreement as the employees and  
3 their guests had?  
4 A Correct.  
5 Q Just one question about this conga line. I think  
6 you said a little while ago that a conga line come  
7 through?  
8 A Yes.  
9 Q And when I say "come through," came through the  
10 Tremont Room, correct?  
11 A Yes.  
12 Q What time of night did that happen?  
13 A It was after dinner, you know, I don't know.  
14 Q Do you know where it came from, which party?  
15 A No.  
16 Q Do you know anybody --  
17 A I have no --  
18 Q Did you know anybody that was in the line?  
19 A I don't know where they came from and I don't know  
20 where they went.  
21 Q Did they come in and leave?  
22 A Yes.  
23 Q How long were they in there?  
24 A Oh, a matter of minutes. I mean, it was 25 or more  
25 people that went through the tables, whatever and

Page 7

1 back out.  
2 MR. BERTLING: That's all I've got.  
3 MR. REID: Couple other questions.  
4 MR. BERTLING: See what I did.  
5 EXAMINATION  
6 BY MR. REID:  
7 Q The attendance at the meeting was optional for  
8 employees?  
9 A Certainly.  
10 Q No one would have been disciplined in any fashion  
11 for not attending?  
12 A That's correct.  
13 Q And parties who -- employees who attended were no  
14 paid for attending?  
15 A That's correct also.  
16 MR. REID: That's all I have.  
17 MR. BERTLING: I have nothing further.  
18 (Proceedings concluded at 12:04 p.m.)  
19  
20  
21  
22  
23  
24  
25

DECEMBER 20, 1999

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STEPHENSON VS. UNIVERSAL METRICS, INC., ET AL.

STANLEY KRUEGER

Page 78

1 STATE OF WISCONSIN } ss:

2 COUNTY OF MILWAUKEE )

3

4

5 I, JILL A. BLESKEY, Registered  
6 Professional Reporter and Notary Public in and for the  
7 State of Wisconsin, do hereby certify that the above  
8 deposition of STANLEY KRUEGER was recorded by me on the  
9 20th day of December, 1999, and reduced to writing under  
10 my personal direction.

11 I further certify that I am not a  
12 relative or employee or attorney or counsel of any of  
13 the parties, or a relative or employee of such attorney  
14 or counsel, or financially interested directly or  
15 indirectly in this action.

16 In witness whereof I have hereunder set  
17 my hand and affixed my seal of office at Milwaukee,  
18 Wisconsin, this 23rd day of December, 1999.

19

20

21

22

Notary Public

23

In and for the State of Wisconsin

24

25

Alt

1 THE COURT: Is your right hand raised?

2 Is it raised, sir?

3 MR. OEHLDRICH: Yes, sir.

4 THE COURT: Okay.

5 JAMES R OEHLDRICH,

6 having been called as a witness on behalf of the  
7 State, having been first duly sworn, testified as  
8 follows: (telephonically)

9 DIRECT EXAMINATION

10 BY MR. BUCHER:

11 Q Mr. Oehldrich, this is Paul Bucher, district  
12 attorney. I'm going to ask you some questions  
13 concerning blood alcohol concentration. Is that  
14 acceptable?

15 A Yes, it is.

16 Q And we talked briefly before today, and I sort of  
17 gave you background, as far as some of the  
18 information we have?

19 A Yes, you did.

20 Q Could you state your name, please and spell your  
21 last name?

22 A James Robert Oehldrich, O-e-h-l-d-r-i-c-h.

23 Q And your occupation, sir?

24 A Forensic toxicologist.

25 Q With what agency?

1 A I am with the Wisconsin Department of Justice State  
2 Crime Lab Milwaukee.

3 Q And as a forensic toxicologist, briefly could you  
4 describe your function for the jury?

5 A My duties are to accept evidence.

6 Q Yes.

7 A Appropriate agencies analyze that evidence for the  
8 presence of alcohol, drugs, poisons, to write a  
9 report of my findings, and testify in court if  
10 necessary, and maintain a chain of custody on all  
11 evidence that I am responsible for.

12 Q And you do this on a fairly regular basis, is that  
13 correct?

14 A Yes.

15 Q And you've testified in courts in the State of  
16 Wisconsin before?

17 A Yes, I have.

18 Q And have you been recognized as an expert in  
19 forensic toxicology?

20 A Yes, I have.

21 Q Now, Mr. Oehldrich, I'm referring to a case number  
22 of the Wisconsin Crime Laboratory, R, as in  
23 Richard, 985066. Are you familiar with that case,  
24 generally?

25 A Yes, I am.

1 A That is procedurally used.

2 Q In this particular case, R 985066, involving the  
3 blood of Michael T. Devine, that is the process  
4 that was utilized, is that correct?

5 A That is correct.

6 Q And the report that was filed by your agency  
7 indicates the blood ethanol concentration of his  
8 blood was .338 grams per one hundred milliliters,  
9 is that correct?

10 A That is correct.

11 Q Now, previous testimony in this case was the legal  
12 limit for an operator driving a motor vehicle,  
13 generally speaking, in Wisconsin is .10 grams per  
14 one hundred milliliters, would you agree with that?

15 A That is correct.

16 Q Now, what I have asked you to do is to give the  
17 jury some idea of what all of that means. What we  
18 have now is simply a number of .338. And what I  
19 would like you to do is possibly give the jury some  
20 idea of what that means, from a quantitative point  
21 of view, how much alcohol one would have to consume  
22 in order to get to that level, and I'm going to  
23 give you certain known and/or assumed facts and ask  
24 if you can give an opinion as to how much alcohol a  
25 person would have had to consume in order to get to



1 stream and in the bladder and ultimately in the  
2 urine?  
3 A The majority is destroyed in the liver.  
4 Q And the average rate of a person metabolizing  
5 varies, is that correct?  
6 A That is correct. The reason we use a range that is  
7 that large is the majority of the people fall  
8 within that range.  
9 Q Some people metabolize alcohol faster, some  
10 metabolize much slower?  
11 A That is correct.  
12 Q Depending upon the rate of metabolism, that will  
13 have an impact on the ultimate blood alcohol  
14 ethanol at a particular time?  
15 A Right.  
16 Q Using that fairly large range almost all  
17 individuals fall within, you are able to compute  
18 for us the average number of drinks Mr. Devine  
19 should have had?  
20 A From approximately 13 drinks to approximately 17  
21 drinks.  
22 Q And that would depend on his rate of metabolism?  
23 A Correct.  
24 Q And so if he was--  
25 A The more drinks he would have to have to get to

1 BY MR. BUCHER:  
2 Q Good afternoon, ma'am.  
3 A Good afternoon.  
4 Q Could you please state your name, and could you  
5 spell your last name for the record?  
6 A Marge Kubowski, K-u-b-o-w-s-k-i.  
7 Q And I know you're nervous. We spoke previously.  
8 Just try to relax. And if you have any questions  
9 of me or there is anything you want to add to your  
10 testimony, feel free to do so. We're investigating  
11 the facts and circumstances leading to the deaths  
12 of Mr. Michael Devine and Kathy Stephenson. So I  
13 have a series of questions to ask you. But, again,  
14 as I told other witnesses, ma'am, if there is  
15 something that comes to your mind that I didn't ask  
16 but you think it might be important for this  
17 inquest jury, please tell them. Tell them whatever  
18 you want. I just have some questions I want to ask  
19 you, okay?  
20 A Okay.  
21 Q If you don't understand what I'm asking you or  
22 anything like that, please let me know. You're  
23 employed as a bartender with the Silver Spring  
24 County Club, is that correct?  
25 A Yes.

1 Q I know you do other things too, but that is one of  
2 your jobs, correct?  
3 A Right.  
4 Q How long have you been with Silver Spring County  
5 Club?  
6 A Since February or March of last year.  
7 Q February of '98, March of '98?  
8 A Right.  
9 Q You're a licensed bartender?  
10 A Yes.  
11 Q Do you recall working at Silver Spring County Club,  
12 and particularly the Universal Metrics, what we  
13 call U.M.I, holiday party on December the 4th,  
14 1998?  
15 A Yes.  
16 Q How were these parties set up? We are getting kind  
17 of a general description. Are these pretty much  
18 set up the same way, holiday parties?  
19 A Yes, they are.  
20 Q How was U.M.I. set up that night?  
21 A As far as how was it set up?  
22 Q Sorry, more specific. As far as you're concerned  
23 with the bar, was--was that inside the room, was it  
24 outside the room?  
25 A It was inside the room.

1 Q Full service bar?  
2 A Yes.  
3 Q How many bartenders?  
4 A One.  
5 Q Just you?  
6 A Right.  
7 Q Testimony we received is there was 57 or so people  
8 there. Is that a fairly good estimate, do you  
9 think.  
10 A Yes.  
11 Q So I am assuming you were pretty busy?  
12 A No.  
13 Q Really? Okay. Was there another bar in the  
14 premises?  
15 A Yes.  
16 Q And where would that have been located?  
17 A There were like three other parties that night, so  
18 they are in different areas of the building.  
19 Q Was there a main bar that wasn't related to any  
20 particular party?  
21 A No, ugh-ugh.  
22 Q Well, ma'am, as a result of the party on December  
23 4th, you were interviewed by Menomonee Falls police  
24 officers on December the 8th, 1998, do you recall  
25 that?

1           get an award?

2     A     This happened, that happened --

3     Q     Right.

4     A     -- after.

5     Q     Right. But that I'm trying to identify, that is

6           the same person we're talking about?

7     A     Yes.

8     Q     All right. The testimony has been that was Michael

9           Devine. So I just wanted to clear that up with

10          you. When-- Ms. Kubowski, when was it first

11          brought to your attention, if you know, from the

12          time people started arriving at 6:30, using that as

13          a reference point, when was it first--when were you

14          first concerned that this guy has had too much to

15          drink?

16    A     After dinner. And they did some kind of gifts,

17          awards and things going on. It was later in the

18          evening. There weren't that many people drinking

19          at that party, so-- He at one point came up and

20          ordered, asked for beer. And I said, "Excuse me?"

21          Because I didn't understand him.

22    Q     Because his speech was slurred or--

23    A     Yes. So then at that point I told him that I can't

24          serve him any alcohol, that he has had enough to

25          drink, and that he can't drive home from this party

1 Q Tell me, tell the jury, please.

2 A I can't tell you for sure when, I wasn't paying  
3 that much attention to what time things were going  
4 on at this particular party. People just were  
5 making different comments about him. And at one  
6 point he came up to the bar and ordered a beer, and  
7 that is when I noticed that he had too much to  
8 drink and I couldn't serve him.

9 Q Fine, I'll leave that alone. Do you recall at that  
10 point expressing concern that he should not drive,  
11 or he should get a ride?

12 A That's correct.

13 Q How did you express, did you verbalize that?

14 A Yes, I did, more than once.

15 Q And did you get any response from anybody?

16 A Yes, I did.

17 Q From who?

18 A A guy that was standing by the bar that was  
19 standing next to this particular guy that was not  
20 getting anything else to drink.

21 Q What kind of response did you receive?

22 A He acted like I was kidding at first, you know. He  
23 kind of chuckled back. And I said, "I'm being very  
24 serious. This man needs a ride home. He cannot  
25 leave this country club in this condition." And he

1           said, "Don't worry, I'll give him a ride." And I  
2           said, "Are you sure?" And he said, "I promise I'll  
3           give him a ride home." So then I went about my  
4           business of getting my station cleaned up and did  
5           not notice when these people left.  
6       Q     After getting that assurance from this person, did  
7           you put a drink or a beer on the bar area in front  
8           of this Mike or in front of this person?  
9       A     After that? No.  
10      Q     At the same time, I mean.  
11      A     I think when he ordered it I went over, reached for  
12           a beer, and at that point I said, "I can't give you  
13           this drink. I can't serve you this beer."  
14      Q     All right. And then shortly around that same time  
15           you got the assurance from this person, he would  
16           give him a ride?  
17      A     Right.  
18      Q     Then you went about your business?  
19      A     That's right.  
20      Q     And the only two names you recall that come to your  
21           mind off the name tag was Mike and John?  
22      A     Correct.  
23      Q     Let me just ask you, you also told the Menomonee  
24           Falls Police Department that this Mike, in addition  
25           to ordering, trying to order beer, he went--would



1 A Yes. David Meyer, M-e-y-e-r.  
2 Q What is your occupation, sir?  
3 A I am a police officer for the Village of Menomonee  
4 Falls.  
5 Q And how long have you been a police officer with  
6 the Village?  
7 A Approximately five months.  
8 Q And were you on duty as a police officer for  
9 Menomonee Falls on December 4th of 1998?  
10 A Yes.  
11 Q And at approximately 10:40 p.m?  
12 A Yes.  
13 Q And on that date, at that time, were you dispatched  
14 to a serious crash which involved several vehicles?  
15 A Yes, I was.  
16 Q And where had that crash occurred, specifically?  
17 A On Silver Spring Drive near Marcy Road,  
18 approximately, I believe the 17800 block.  
19 Q And that is also in the Village of Menomonee Falls,  
20 Waukesha County?  
21 A Yes, it is.  
22 Q What time was your arrival on the scene?  
23 A I would have to review my report, specifically. It  
24 should have been around 10:40 p.m, right in that  
25 range.

1 Q So, approximately 10:40. And what did you observe  
2 upon arrival?  
3 A It was pretty chaotic. There was a lot of people  
4 standing around. I noticed four vehicles that  
5 appeared to be involved in the accident that I was  
6 dispatched to. The roadway was littered with a lot  
7 of debris and glass and vehicle parts and stuff  
8 like that.  
9 Q And did you prepare a written report as a result of  
10 your investigation of this crash?  
11 A Yeah, I filed a supplement to the original report.  
12 Q And would that be incident report TA98-859?  
13 A Yes.  
14 Q Now, there is a diagram that is in front of you  
15 depicting the position of the vehicle that was  
16 investigated. Would you say that this is an  
17 accurate depiction of what you observed when you  
18 arrived at the scene?  
19 A Yes.  
20 Q You can take your seat again. Now, just for some  
21 background, what were the weather conditions on  
22 December 4th of 1998?  
23 A I'd characterize it as moderately heavy fog, and a  
24 slight mist as well.  
25 Q What were the road conditions?

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COURT OF APPEALS  
STATE OF WISCONSIN  
DISTRICT I

JUN 12 2001

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OF WISCONSIN

RICKY D. STEPHENSON, Individually and  
as Personal Representative for the  
ESTATE OF KATHY M. STEPHENSON,

Plaintiffs-Respondents,

v.

Appeal No: 00-1397

Trial Court Case No: 99-CV-4772

UNIVERSAL METRICS, INC., OHIO  
CASUALTY INSURANCE COMPANY,  
WEST AMERICAN INSURANCE COMPANY  
and AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

Defendants,

and

JOHN H. KREUSER and SENTRY  
INSURANCE, a mutual company,

Defendants-Appellants.

---

REQUEST FOR RECONSIDERATION

---

BORGELT, POWELL, PETERSON & FRAUEN, S.C.  
Attorneys for Defendants-Appellants

By: James M. Fredericks  
State Bar No. 1014015

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JUN 13 2001

BORGELT, POWELL, PETERSON & FRAUEN  
S.C.  
ATTORNEYS

A178

In footnote 3 of the court of appeals' May 15, 2001, decision, the court accuses counsel of lying to the court. For the following reasons, Kreuser and Sentry request reconsideration by asking the court to delete footnote 3. We were not "knowingly 'mak[ing] a false statement.'" The statements made in our briefs were not lies.

The only depositions taken in this civil suit were that of John Kreuser and Stanley Krueger, a representative from Universal Metrics. The bartender gave testimony at a criminal inquest hearing, which was attached to the parties' appendices for purposes of background. However, the bartender has not been deposed in this civil suit.

Attached again is Appendix 170 from our appendix, which is page 35 from John Kreuser's deposition. We did not lie to the court of appeals when we said that Kreuser nodded his head. Kubowski may state that Kreuser did more than that, but that is her version. That does not mean that we are lying to the court when we state Kreuser's sworn deposition testimony.

Page 38 of Kreuser's deposition testimony, marked as Appendix 172 (attached again), states that after he nodded, the bartender did indeed serve Devine the drinks. The court of appeals seems to believe that because Kubowski does not state in her inquest testimony whether she served any further alcohol to Devine, that must be the fact and that whatever Kreuser says is not to be given

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any credence. The court then accuses us of "knowingly 'mak[ing] a false statement.'"

When we stated in our brief in chief: "Kreuser said nothing, but simply nodded his head once affirmatively. The bartender then proceeded to serve Devine," there was nothing false about that. That is what he said. That is not "mak[ing] a false statement of fact or law to a tribunal." When we said in our reply brief: "The record shows that the bartender may have served Devine and Devine may have consumed alcohol as a result of Kreuser offering to give Devine a ride home," we did not "make a false statement of fact or law to a tribunal," because the record does indeed show that the bartender served Devine after Kreuser's assurance.

However, by citing SCR 20:3.3, the court has accused us of "knowingly" lying to the court. Such an accusation carries with it the element of intent, yet nowhere does the court particularize the elements of intent in making the accusation.

The court's references to our briefs in footnote 3 do not support the conclusion that we knowingly lied to the court, because we believe the statements in our briefs are correct. Certainly, if we made a mistake in reference to a record reference, we apologize. However, we believe no error was made in referencing the record. Notwithstanding, if the court believes there was an error made in referencing the record, it is one thing to point out the discrepancy. It is entirely another to accuse counsel of lying ("knowingly 'mak[ing] a false statement'") in an opinion recommended for publication.

Dated at Milwaukee, Wisconsin, this 11 day of June, 2001.

BORGELT, POWELL, PETERSON & FRAUEN, S.C.  
Attorneys for Defendants-Appellants

By:   
James M. Fredericks (SBN1014015)

- 1 Q Okay. After hearing the bartender ask Mike Divine  
2 whether he had a ride home, what did you do?
- 3 A I had just turned to see what was going on, more or  
4 less, and Mike had made a motion like I was it.
- 5 Q All right. And he made a motion with his head?
- 6 A Yes.
- 7 Q So you interpreted his motion to be a signal to the  
8 bartender to you that you were his ride home?
- 9 A Uh-huh.
- 10 Q Is that a yes?
- 11 A Yes.
- 12 Q So you saw him do that?
- 13 A Yes.
- 14 Q And she was looking at him when -- the bartender  
15 was looking at him when he did that?
- 16 A Yes.
- 17 Q And what did you do in response to that?
- 18 A I just nodded my head.
- 19 Q To who?
- 20 A To the bartender.
- 21 Q And by nodding your head you were indicating to the  
22 bartender that you were going to give him a ride  
23 home, correct?
- 24 A Yes.
- 25 Q And you understood by nodding to the bartender then



1 A Yes.

2 Q Did he -- strike that. Did she serve him the  
3 drinks at that point in time?

4 A Yes.

5 Q Do you know how many drinks there were?

6 A I thought there were three.

7 Q Do you recall what they were?

8 A I believe it was a glass of wine, a bloody Mary--  
9 maybe there was two drinks. I only recall a glass  
10 of wine and a bloody Mary.

11 Q Do you know who Mike was with at that time?

12 A No, I do not. But he did go back to his table.

13 Q All right. The table he had eaten at?

14 A Yes.

15 Q Did Mike appear intoxicated at that point to you?

16 MR. FREDERICKS: Asked and answered.

17 THE WITNESS: No.

18 BY MR. BERTLING:

19 Q Now, on December 4th of 1998, you were a department  
20 head, correct?

21 A. Yes.

22 Q When you intended to give Mike a ride home did you  
23 give this -- did you formulate this intention and  
24 give this signal to the bartender that you would do  
25 that as a department head for UMI?

\*APPNDX 172\*

EXHIBIT F-13



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Cornelia G. Clark  
Clerk

June 26, 2001

To:

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You are hereby notified that the Court has entered the following order:

00-1397

Ricky D. Stephenson, Individually and as Personal  
Representative for the Estate of Kathy M. Stephenson v.  
Universal Metrics, Incorporated, et al.  
L.C. #99-CV-004772)

Before Wedemeyer, P.J., Fine and Schudson, JJ.

John H. Kreuser and Sentry Insurance request that this court reconsider the  
opinion released on May 15, 2001, in the above matter, on the ground that footnote three

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to the opinion misstates the record. Upon further review of the record, we agree and, although motions for reconsideration are not permitted, WIS. STAT. RULE 809.24 (1999-2000), we reconsider *sua sponte*, and apologize for any inconvenience or discomfort that might have been caused by the original footnote three.

Upon the foregoing reasons,

IT IS ORDERED that the errata issued June 26, 2001, revises paragraph four and footnote three.

---

Correlia G. Clark  
Clerk of Court of Appeals

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 24, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1947

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

**RICKY D. STEPHENSON, INDIVIDUALLY  
AND AS THE PERSONAL  
REPRESENTATIVE FOR THE ESTATE OF  
KATHY M. STEPHENSON,**

**PLAINTIFF-APPELLANT,**

**v.**

**UNIVERSAL METRICS, INC.,  
OHIO CASUALTY INSURANCE  
COMPANY AND WEST AMERICAN  
INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS,**

**JOHN H. KREUSER AND  
SENTRY INSURANCE, A MUTUAL COMPANY,**

**DEFENDANTS-CO-APPELLANTS,**

RECEIVED  
JUL 24 2001  
BORGELT, POWELL, PETERSON & FRAUEN  
SC  
ATTORNEYS

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AMERICAN FAMILY MUTUAL INSURANCE COMPANY,  
DEFENDANT.

---

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, J.J.

¶1 FINE, J. Ricky D. Stephenson, individually and as personal representative of the estate of his wife Kathy M. Stephenson, and Sentry Insurance and its insured John H. Kreuser appeal from a judgment that dismissed all claims against Universal Metrics, Inc., and its insurance carrier West American Insurance Company. We affirm in part, reverse in part, and remand for further proceedings.

¶2 As we noted in an earlier decision, *Stephenson v. Universal Metrics, Inc.*, 2001 WI App 128, ¶¶ 1-4, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, Kathy Stephenson died because while driving her car she was hit by a drunk driver. The drunk driver, Michael T. Devine, who also died as a result of the crash, was an employee of Universal Metrics. He got drunk, very drunk, at a pre-Christmas party sponsored by Universal Metrics at the Silver Spring Country Club. Indeed, after the accident he had a blood-alcohol level of .338, more than three times the highest lawful blood-alcohol concentration for drivers of less than .10. WIS. STAT. §§ 340.01(46m) and 346.63. Stephenson claimed that Kreuser volunteered to drive Devine home but did not do so. Although the trial court ruled that Wisconsin's liquor-provider immunity statute, WIS. STAT. § 125.035, precluded claims against Universal Metrics and West American Insurance, the

trial court held that Kreuser was not immune for the alleged breach of the duty he had assumed voluntarily, namely to drive Devine home. *Stephenson*, 2001 WI App 128 at ¶5. We affirmed. We did not, however, address other claims asserted against Universal Metrics and West American Insurance. Stephenson claims that Universal Metrics and its insurer West American are liable for both Kreuser's alleged breach of the duty he assumed to drive Devine home, and for damages caused by Devine's drunk driving. We turn to these issues now.

¶3 The issues on this appeal were decided by the trial court on summary judgment. Summary judgment is used to determine whether there are any disputed facts that require a trial, and, if not, whether a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2); *U.S. Oil Co., Inc. v. Midwest Auto Care Servs., Inc.*, 150 Wis. 2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Of course, "summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear." *Lecus v. American Mut. Ins. Co.*, 81 Wis. 2d 183, 189, 260 N.W.2d 241, 243 (1977). Moreover, we must look at the facts in a light most favorable to the party opposing summary judgment. *Lambrecht v. Kaczmarczyk*, 2001 WI 25, ¶¶12, 23, 241 Wis. 2d 804, 812, 815, 623 N.W.2d 751, 758-759. Our review of a trial court's grant of summary judgment is *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987).

¶4 The trial court held that WIS. STAT. § 125.035 barred claims against Universal Metrics and West American Insurance in connection with Kathy Stephenson's death at Devine's hand. That section provides, as material here:

**Civil liability exemption: furnishing alcohol beverages.** (1) In this section, "person" has the meaning given in s. 990.01(26).

(2) A person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person.

WISCONSIN STAT. § 990.01(26) defines "person" to "include[]" all partnerships, associations and bodies politic or corporate."

¶5 WISCONSIN STAT. § 125.035(2) is a broad grant of immunity and not only prevents the imposition of liability on someone who gives a person alcohol, but also immunizes from liability those who: 1) encourage or help a person to drink, or conspire to do so; and 2) knowing that that person would drive, do nothing to either prevent that person from consuming alcohol or prevent that person from driving while drunk. *Greene v. Farnsworth*, 188 Wis. 2d 365, 368–369, 370–372, 525 N.W.2d 107, 108–109, 109–110 (Ct. App. 1994).

¶6 In *Greene*, a young child was severely injured when struck by a car driven by Michael J. Riekkoff. Riekkoff was drunk at the time, and the complaint alleged that William L. Farnsworth and Wayne A. Farnsworth "encouraged, advised and assisted Riekkoff to consume alcoholic beverages over the nine-hour period" they went from tavern to tavern. *Id.*, 188 Wis. 2d at 369, 525 N.W.2d at 108. *Greene* noted that no matter how phrased, the plaintiffs' theories of liability arose "out of the Farnsworths' act[s] of providing Riekkoff with alcoholic beverages" and that the statute "specifically grants immunity 'from civil liability arising out of the act of procuring alcohol ... or giving away alcohol beverages....'" *Id.*, 188 Wis. 2d at 372, 525 N.W.2d at 110 (emphasis by *Greene*). Thus, the underlying theory of liability is irrelevant as long as the liability sought to be imposed arises out of the act of providing alcoholic beverages. *Greene* noted that



there was no way to “distinguish between the underlying behavior and the conspiracy and aiding and abetting causes of action” alleged by the Greenes that was consistent with the legislature’s intent to immunize “[t]averns, businesses, social hosts and drinking companions” from lawsuits “for serving alcohol based on the theory that they were part of a conspiracy to encourage intoxication and drunk driving.” *Ibid. Greene* upheld the trial court’s dismissal of the Farnsworths from the action. *Id.*, 188 Wis. 2d at 368–370, 525 N.W.2d at 108–109.

1. *Liability of Universal Metrics and West American Insurance for Kreuser’s alleged breach of an assumed duty to drive Devine home.*<sup>1</sup>

¶7 In our May 15, 2001, decision in *Stephenson* we held that WIS. STAT. § 125.035(2) did not provide Kreuser with immunity from liability for his voluntary undertaking to drive Devine home. There are two issues here in connection with that ruling. First, whether the West American Insurance policy covering Universal Metrics provides liability coverage if Kreuser is found to be liable for a breach of the voluntary undertaking. This requires us to apply West American’s policy and presents an issue of law that we, like our main task on an appeal from a summary judgment determination by the trial court, also decide *de novo*. See *Filing v. Commercial Union Midwest Ins. Co.*, 217 Wis. 2d 640, 644, 579 N.W.2d 65, 66 (Ct. App. 1998). Second, whether Universal Metrics is liable for Kreuser’s alleged breach of the voluntary undertaking. As we will see, these two issues are interrelated.

---

<sup>1</sup> John H. Kreuser and his insurance carrier, Sentry Insurance, only discuss in their appellate briefs the liability of West American Insurance for Kreuser’s undertaking to drive Michael T. Devine home, and not the liability of Universal Metrics. This is pointed out by the brief submitted to us by West American, and is not controverted in the Kreuser/Sentry response brief. Stephenson, however, argues that Universal Metrics is liable as Kreuser’s employer under *respondeat superior*. Thus, we consider the liability of both Universal Metrics and West American in connection with Kreuser’s undertaking to drive Devine home.

A. *Liability of West American Insurance under its policy for the actions of Kreuser.*

¶8 The West American policy issued to Universal Metrics promises to “pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” An “insured” is defined by the policy as including Universal Metrics’s “‘employees’ other than either your ‘executive officers,’ (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.” West American Insurance does not contend on appeal that Kreuser fits within any of the nested exceptions to the policy’s definition of which employees are insureds under the policy. See *Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (matters not argued are waived). Thus, we must determine if there are genuine issues of material fact regarding whether Kreuser was acting either within the “scope of his employment” with Universal Metrics or while he was “performing duties related to the conduct” of Universal Metrics’s business when he undertook to drive Devine home. If so, summary judgment was not appropriate.

¶9 No one disputes that the party at the Silver Spring Country Club was a Universal Metrics affair, and that Universal Metrics had the exclusive use of a room at the club. Universal Metrics provided the food, and two drink tickets, which could be used for any type of drink. Employees checked in when they arrived, and received name tags in addition to their drink tickets. The president of Universal Metrics gave a speech to the employees after dinner, and there was a

company awards ceremony. Additionally, the company president circulated among the employees. One of the party's purposes was to foster good will between Universal Metrics and its employees.

¶10 Much of the analysis of whether an employee acts within the scope of employment focuses on the employee's intent at the time. *Olson v. Connerly*, 156 Wis. 2d 488, 497–501, 457 N.W.2d 479, 482–484 (1990) (sex between medical assistant at health-care clinic and physician on medical-school faculty who was assigned to clinic as part of faculty duties was not within the scope of his employment at the clinic). Thus, an employee acts within the scope of his or her employment as long as the employee is, at least, “partially actuated by a purpose to serve the employer.” *Id.*, 156 Wis. 2d at 499, 457 N.W.2d at 483. On the other hand, an employee does not act within the scope of his or her employment if the employee does something that “is different in kind from that authorized [by the employer], far beyond the authorized time or space limits [established for the employment], or too little actuated by a purpose to serve the” employer. *Scott v. Min-Aqua Bats Water Ski Club, Inc.*, 79 Wis. 2d 316, 321, 255 N.W.2d 536, 538 (1977) (ski club employee was acting within the scope of his employment when he accidentally discharged a shotgun while practicing for a show). Moreover, “[s]erving the employer need not be the sole purpose of the employee's conduct, nor need it be even the primary purpose” for the employee to be acting within the scope of the employment. *Block v. Gomez*, 201 Wis. 2d 795, 806, 549 N.W.2d 783, 788 (Ct. App. 1996) (sex by therapist with patient not within scope of therapist's employment so as to make therapist's employer liable under *respondeat superior*).

¶11 Kreuser was part of Universal Metrics's management. Thus, although it might be entirely logical to conclude that he agreed to drive Devine

home because, as he testified at his deposition, he was just being a "nice guy," that does not end the matter. A reasonable jury could also perceive that Kreuser had at least some business purpose in offering to drive Devine home. Devine was a valued employee. Either his arrest or involvement in an accident because he was driving while drunk would not only cause him personal problems that might decrease his job efficiency, but would also cause problems for Universal Metrics because he got drunk at a company party. This was not the first time that Devine had been in an alcohol-related crash. Moreover, Kreuser knew when he offered to drive Devine home that Devine had been previously convicted of drunk driving. Although, as noted, Kreuser testified at his deposition that Devine did not appear to be drunk when Kreuser agreed to drive him home, a reasonable jury might not believe him. First, Devine's post-accident blood-alcohol level was .338, which a forensic toxicologist with the state crime laboratory testified at the Waukesha County inquest into the double fatality meant that Devine had between thirteen and seventeen drinks that evening. Second, the bartender at the Universal Metrics party that night testified at the inquest that when Kreuser agreed to drive Devine home, Devine was so drunk that she could not understand what he was saying. In light of all this, a reasonable jury could conclude that Kreuser was, in the words of *Olson* quoted above, at least "partially actuated by a purpose to serve the employer" in offering to drive Devine home. *Olson*, 156 Wis. 2d at 499, 457 N.W.2d at 483.

¶12 Applying to this case the first of the two additional factors discussed in *Scott*, whether what the employee did was "different in kind from that authorized by the employer," *Scott*, 79 Wis. 2d at 321, 255 N.W.2d 538, a reasonable jury could conclude that driving Devine home was not something that Universal Metrics would have forbidden had Kreuser asked first. Indeed, the jury

could conclude that Kreuser was acting consistent with company policy. First, as we have seen, Kreuser was part of management. Second, the president of Universal Metrics testified in his deposition that if he had been aware that someone at the party was drunk, "an offer would have been made" to drive that person home. Third, Kreuser had driven Devine home from a company party once before because Devine had too much to drink.

¶13 Turning to the second of the two additional factors discussed by *Scott*, whether what the employee did was "beyond the authorized time or space limits" for the employment, *ibid.*, a reasonable jury could conclude that Kreuser's offer to drive Devine was made on what was essentially company "time" and within company "space," albeit after normal business hours and away from the company's physical plant.

¶14 Finally, although we discussed earlier the third *Scott* factor, the employee's intent, *ibid.*, we are mindful that a question of intent can rarely be resolved by the court as a matter of law. *Lecus*, 81 Wis. 2d at 190, 260 N.W.2d at 244. Additionally, whether an employee acts within the scope of his or her employment is generally a fact issue to be decided by a jury. *Desotelle v. Continental Cas. Co.*, 136 Wis. 2d 13, 26-27, 400 N.W.2d 524, 529 (Ct. App. 1986). Accordingly, we believe that it is a jury question whether Kreuser was acting within the scope of his employment at Universal Metrics when he agreed to drive Devine home.

¶15 As noted earlier, the West American policy also provides liability coverage for acts of Universal Metrics's employees committed while the employees "are performing duties related to the conduct of [Universal Metrics's] business." Kreuser was at the Universal Metrics party because he was part of

Universal Metrics's management. And, as we have seen, the party had business as well as social purposes; the business of an enterprise extends beyond the bare money-making activities of taking, processing, and selling goods or services. We believe, as with the scope-of-employment issue discussed above, and for the reasons already discussed, that it is also a jury question whether Kreuser was doing something related to the business of Universal Metrics when he offered to drive Devine home.

*B. Liability of Universal Metrics for the actions of Kreuser.*

¶16 An employer is vicariously liable for torts that an employee commits while the employee is acting within the scope of his or her employment. *Scott*, 79 Wis. 2d at 320, 255 N.W.2d at 538. For the reasons we have already discussed, it is for a jury to decide whether Kreuser was acting within the scope of his employment at Universal Metrics when he agreed to drive Devine home, but did not.

¶17 We reverse the trial court's grant of summary judgment dismissing the claims of Stephenson, Kreuser, and Sentry against Universal Metrics and West American Insurance in connection with Kreuser's undertaking to drive Devine home.

2. *Liability of Universal Metrics for the actions of Devine under the doctrine of respondeat superior.*

¶18 Stephenson argues that Universal Metrics is responsible for Devine's negligence in drinking, driving, and crashing into Kathy Stephenson's car because, Stephenson contends, Devine was acting within the scope of his employment at each of those times. He cites authorities from other jurisdictions that impose liability for accidents caused by drunken employees on their way home from



company-sponsored events where liquor was served. This argument, however, ignores WIS. STAT. § 125.035(2) and its broad grant of immunity. For the reasons already discussed above, Universal Metrics is immune from civil liability for doing anything that either encouraged Devine to drink or failed to stop him from either drinking or driving while drunk. *Greene*, 188 Wis. 2d at 368–369, 370–372, 525 N.W.2d at 108–109, 109–110. Moreover, an employer is not liable under the doctrine of *respondeat superior* for injuries caused by an employee's negligent driving either to and from work or to and from some company-sponsored event, even when—as it was not here—attendance is required *unless* the employer exercises control over the method or route of travel. *DeRuyter v. Wisconsin Elec. Power Co.*, 200 Wis. 2d 349, 354–362, 546 N.W.2d 534, 537–540 (Ct. App. 1996), *aff'd by an equally divided court*, 211 Wis. 2d 169, 565 N.W.2d 118 (1997).

¶19 We affirm the trial court's dismissal of Stephenson's claims, based on *respondeat superior*, seeking to hold Universal Metrics liable for Devine's drunk driving.

3. *Liability of Universal Metrics for its failure to prevent Devine from driving while drunk.*

¶20 Stephenson asserts various theories under which he contends that Universal Metrics had a duty to ensure that Devine would not hurt others, and argues that these trump WIS. STAT. § 125.035(2). We disagree.

¶21 First, he proffers RESTATEMENT (SECOND) OF TORTS § 317 (1964), which recognizes that an employer has a duty to exercise “reasonable care so to control” the employee while the employee is “acting outside the scope of his employment as to prevent him from ... conducting himself as to create an



unreasonable risk of 'bodily harm' to others if the employee is on the employer's premises.<sup>2</sup> But, of course, Devine did not cause harm to anyone at the party, and it was only after he left the party that he killed Kathy Stephenson by driving while drunk. Thus, § 317 of the Restatement is not applicable.

¶22 Second, Stephenson also cites out-of-state cases that impose liability for alcohol-related accidents caused by employees who drank while on company premises. But, as we have seen, WIS. STAT. § 125.035(2) grants immunity from liability predicated on letting someone else drive while drunk. *Greene*, 188 Wis. 2d at 368-369, 370-372, 525 N.W.2d at 108-109, 109-110. As *Green* tells us, "[i]n abolishing liability for those who supply alcohol to adults, the legislature clearly intended to completely immunize such persons from all civil liability, regardless of the number of people involved or the particular label used by artfully drafted pleadings." *Id.*, 188 Wis. 2d at 372-373, 525 N.W.2d at 110. We must accept the law as it is. *See id.*, 188 Wis. 2d at 373, 525 N.W.2d at 110.

---

2 RESTATEMENT (SECOND) OF TORTS § 317 (1964), provides:

Duty of Master to Control Conduct of Servant.

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

¶23 We affirm the trial court's dismissal of Stephenson's claims, based on all the other theories seeking to hold Universal Metrics liable for Devine's drunk driving.<sup>3</sup>

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded.

Publication in the official reports is recommended.

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<sup>3</sup> In an undeveloped and amorphous argument, Stephenson also contends that West American Insurance provides coverage for Devine's drunk driving. As we have seen, however, coverage for employees is "only for acts within the scope of their employment by [Universal Metrics] or while performing duties related to the conduct of [Universal Metrics's] business." Moreover, the policy excludes liability predicated on the "use ... of any ... auto ... operated by ... any insured." Stephenson does not explain, beyond mere conclusory arguments, how or why Devine either falls within the policy's coverage or is not excluded by the exclusion; indeed, he does not even discuss the policy's language. We thus do not further consider Stephenson's contentions on this point. See *Barakat v. Department of Health & Social Servs.*, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398–399 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments); see also *Libertarian Party of Wisconsin v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424, 430 (1996) (only issues that have merit need be discussed).



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September 25, 2000

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You are hereby notified that the Court has entered the following order:

00-1397

Ricky D. Stephenson, Individually and as Personal Representative for the Estate of Kathy M. Stephenson v. Universal Metrics, Incorporated, American Family Mutual Insurance Company and Ohio Casualty Insurance Company, West American Insurance Company, John H. Kreuser and Sentry Insurance, A Mutual Insurance (L.C. #99-CV-004772)

A199

00-1947                      Ricky D. Stephenson, Individually and as the Personal Representative for the Estate of Kathy M. Stephenson v. Universal Metrics, Inc., Ohio Casualty Insurance Company and West American Insurance Company, John H. Kreuser and Sentry Insurance, a mutual company, American Family Mutual Insurance Company (L.C. #99 CV 4772)

Before Wedemeyer, P.J.

Sentry Insurance, A Mutual Company and John H. Kreuser move to amend the caption in Appeal No. 00-1947. The court will grant the motion. The notice of appeal filed on August 23, 2000 was erroneously treated as a notice of cross-appeal, rather than a notice of co-appeal. The caption of Appeal No. 00-1947 shall be amended to reflect that Sentry and Kreuser are co-appellants, and that Ricky D. Stephenson, Individually and as the Personal Representative for the Estate of Kathy M. Stephenson, are appellants.

Sentry and Kreuser also move to consolidate briefing in this case with a related appeal, No. 00-1397. Because the respondents in the two appeals differ, the court will deny that motion. The court concludes that briefing will be simplified if separate briefs are filed. The court will, however, consolidate the appeals for disposition.

IT IS ORDERED that the caption is Appeal No. 00-1947 is amended to reflect that Sentry Insurance, A Mutual Company and John H. Kreuser are co-appellants and that Ricky D. Stephenson, Individually and as the Personal Representative for the Estate of Kathy M. Stephenson, are appellants.

IT IS FURTHER ORDERED that the motion to consolidate briefing is denied.

IT IS FURTHER ORDERED that Appeal Nos. 00-1397 and 00-1947 are consolidated for disposition purposes.

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*Cornelia G. Clark*  
*Clerk of Court of Appeals*

**SUPREME COURT OF THE STATE OF WISCONSIN**

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RICKY D. STEPHENSON, Individually and  
as Personal Representative for the  
ESTATE OF KATHY M. STEPHENSON,

Plaintiff-Respondent,

v.

UNIVERSAL METRICS, INC.,  
WEST AMERICAN INSURANCE COMPANY, and  
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants,

and

JOHN H. KREUSER, and  
SENTRY INSURANCE, a mutual company,

Defendants-Appellants-Petitioners.

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Appeal Taken From The Decision Dated May 15, 2001,  
Of The Court of Appeals, District I,  
Before Presiding Judge Charles B. Schudson

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Appeal From The Circuit Court For Milwaukee County,  
The Honorable Victor Manion Presiding

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**RESPONDENT'S BRIEF AND APPENDIX**

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## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

### **1. Oral Argument**

Oral argument is requested. Given the nature and significance of the issues presented, the court would benefit from oral argument.

### **2. Publication**

Publication is requested. The criteria for publication are met.

## STATEMENT OF THE CASE

### I. Nature Of The Case And Procedural Status

This appeal arises out of a motion to dismiss filed on January 20, 2000, by the defendants-appellants-petitioners, John H. Kreuser and Sentry Insurance, a mutual company (hereinafter referred to as Kreuser). (R17: 1-3). Kreuser filed two affidavits in support of its motion. (R19: 28). As a consequence, his motion was treated as one for summary judgment.<sup>1</sup>

On February 25, 2000, plaintiff-respondent, Ricky D. Stephenson, individually and as the personal representative for the Estate of Kathy M. Stephenson (hereinafter Stephenson), filed his brief in response to the Kreuser motion. His brief opposed the Kreuser motion based upon the legal principles set forth within *American Mutual Liability Insurance Company v. St. Paul Fire and Marine Insurance Company*, 48 Wis.2d 305, 313, 179 N.W.2d 864, 868 (1970), *Gritzner v. Michael R.*, 228 Wis.2d 541, 598 N.W.2d 282 (Ct. App. 1999), and *Restatement (Second) Torts §324A*. (R.29:24-27; R.Ap. 101-104).

The trial court rendered its decision regarding the Kreuser motion on April 3, 2000. The trial court denied the Kreuser motion based upon the

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<sup>1</sup>

In that Kreuser filed affidavits for consideration with respect to his motion to dismiss, it was treated as one for summary judgment pursuant to Wis. Stat. §802.08. (See Wis. Stat. §802.06(3)).

principles presented in opposition by Stephenson.<sup>2</sup> (R.48: 32, 33-37; R.Ap. 132-137). No where in the trial court's decision regarding Kreuser is there a direct reference or, even an inference, that the denial was based upon an allegation of continued alcohol consumption by Michael Devine. (hereinafter Devine). The trial court's denial of the Kreuser motion was based solely upon his voluntary undertaking of a duty to transport Devine. This is the type of undertaking referred to within *Restatement (Second) Torts §324A* and adopted by Wisconsin in *American Mutual Liability Insurance Company v. St. Paul Fire and Marine Insurance Company* and, reaffirmed by the two *Gritzner* decisions.

The Court of Appeals, District I, by Justice Schudson, affirmed the trial court's decision regarding Kreuser. It concluded that Kreuser's alleged conduct is encompassed by the standards in the *Restatement (Second) Torts Sections 324A* (1965), as adopted within Wisconsin and, most recently, reaffirmed in *Gritzner v. Michael R.*, 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906. (*Stephenson v. Universal Metrics, Inc., et al.*, 2001 WI App. 128 ¶2, \_\_\_ Wis.2d \_\_\_, 630 N.W.2d 767, 768).

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<sup>2</sup>

The trial court's decision was rendered prior to the Supreme Court's decision of *Gritzner v. Michael R.* 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906, which was decided on June 23, 2000 and, which affirmed the Court of Appeals decision with respect to the legal principles upon which the trial court denied the Kreuser motion.

In another appeal arising from the same trial court decision, the Court of Appeals reversed a dismissal of the defendant, Universal Metrics, Inc., (hereinafter referred to as UMI), concluding that an issue of fact was presented as to whether Kreuser was within the scope of his employment with UMI when he undertook the duty to transport. If so, UMI and its insurer would be vicariously liable. (*Stephenson v. Universal Metrics, Inc., et al.*, 2001 WI App. 173 ¶¶16-17, \_\_\_ Wis.2d \_\_\_, 633 N.W.2d 707). Petitions for review to the Supreme Court have been filed by all parties to that decision. They are pending.

### **STATEMENT OF FACT**

This matter arises out of a motor vehicle accident occurring between a vehicle operated by Devine, and Kathy M. Stephenson, immediately following a UMI holiday function. This accident occurred on December 4, 1998. At that time, Devine was an employee of UMI, working within its manufacturing department. (R.30: 26-27). Devine was extremely intoxicated at the time of the accident. His vehicle crossed the centerline, striking the Stephenson vehicle head-on. Both Devine and Stephenson died as a result of injuries sustained in this accident.

At the time of the accident, Devine had a blood ethanol concentration of .338 grams per 100 milliliters. (R.30:82-84; R.Ap. 122-124). It has been

determined that this translates into the consumption of approximately 13 to 17 drinks. (R.30:85; R.Ap. 125).

The UMI function was held at the Silver Spring Country Club. The Country Club provided a bartender to serve attendees. (R.30:87-89; R.Ap. 126-128). The bartender was approached by Devine during the UMI function. He was so intoxicated that she could not understand him. (R.30:90; R.Ap.129). Therefore, she informed him that she could not serve him additional alcohol, he had enough to drink, and he could not drive home from the function. (R.30:90-91; R.Ap. 129-130).

Kreuser was standing at the bar near Devine when this conversation occurred. The bartender testified as follows regarding what occurred next:

A. I can't tell you for sure when, I wasn't paying that much attention to what time things were going on at this particular party. People just were making different comments about him. And at one point he came up to the bar and ordered a beer, and that is when I noticed that he had too much to drink and I couldn't serve him.

Q Fine, I'll leave that alone. Do you recall at that point expressing concern that he should not drive, or he should get a ride?

(Ms. Kubowski)

A That's correct.

Q How did you express, did you verbalize that?



A Yes, I did, more than once.

Q And did you get any response from anybody?

A Yes, I did.

Q From who?

A A guy that was standing by the bar that was standing next to this particular guy that was not getting anything else to drink.

Q What kind of response did you receive?

A He acted like I was kidding at first, you know. He kind of chuckled back. And I said, "I'm being very serious. This man needs a ride home. He cannot leave this country club in this condition." And he said, "Don't worry, I'll give him a ride." And I said, "Are you sure?" And he said, "I promise I'll give him a ride home." So then I went about my business of getting my station cleaned up and did not notice when these people left.

Q After getting that assurance from this person, did you put a drink or a beer on the bar area in front of this Mike or in front of this person?

A After that? No.

Q At the same time, I mean.

A I think when he ordered it I went over, reached for a beer, and at that point I said, "I can't give you this drink. I can't serve you this beer."

Q All right. And then shortly around that same time you got the assurance from this person, he would give him a

ride?

A Right.

Q Then you went about your business?

A That's right.

Q And the only two names you recall that come to your mind off the name tag was Mike and John?

A Correct.

(R. 30:91-92; R.Ap. 130-131).

Kreuser has a history of undertaking the responsibility of transporting Devine after he became intoxicated. In 1995, Kreuser undertook the responsibility to transport Devine from a similar UMI holiday function. In 1998, he undertook the responsibility of transporting an intoxicated Devine from a private social gathering. (R.30:65-67; R.Ap. 107-109).

Kreuser acknowledges a conversation with the bartender. He acknowledges that through his communications with the bartender, he was notifying her that he was undertaking the responsibility to transport Devine. However, he has characterized his acquiesce as a nonverbal "nodding" of the head. (R.30:69-74; R.Ap. 110-115).

The president and CEO of UMI, Stanley Krueger, testified that UMI "staff" was prepared to undertake the responsibility of transporting intoxicated attendees. (R.30:23; R.Ap. 106). Kreuser was a member of this "staff" as the

head of the Engineering Department. (R.30:8; R.Ap. 105).

Therefore, Kreuser had a history of undertaking the responsibility of transporting Devine from events during which he would become intoxicated. Moreover, Kreuser was a member of the UMI “staff” which was prepared to provide transportation to an intoxicated attendee on the evening of the accident. Finally, without dispute, Kreuser took upon himself the responsibility of transporting Devine through his communications with the Silver Spring Country Club bartender.

For various reasons, Kreuser changed his mind and decided not to provide Devine transportation. He did not tell anyone at the function that he changed his mind. He did not communicate this change to Devine. He did not communicate this change to the bartender. (R.30:78-80; R.Ap. 119-121).

There is no direct evidence in the record that Devine consumed additional alcoholic beverages after Kreuser notified the bartender that he would undertake the responsibility of transporting him. The bartender states specifically that she served Devine no more alcohol after Kreuser’s acknowledgment that he would undertake the responsibility of transportation. (R.30:92; R.Ap. 131).

Kreuser recalls that the bartender served Devine three drinks. However, he can offer no direct evidence that Devine consumed these beverages.

Kreuser testified that Devine took the drinks from the bar to a table where he had previously eaten. (R.30:74; R.Ap. 115). Kreuser, however, acknowledges that he was informed by Devine at approximately 9:00 p.m. that he was unable to obtain alcohol from the bartender. (R.30:75-77; R.Ap. 116-118).

Therefore, there is no direct evidence that Devine consumed alcohol after the Kreuser undertaking. There is a genuine issue as to a material fact as to whether the bartender provided alcohol to Devine after the undertaking. The bartender specifically states that she did not. Kreuser recalls three drinks were offered but, can offer no testimony as to whether they were consumed by Devine or merely taken back to his table to be consumed by other dinner companions. Finally, Kreuser acknowledges that he was informed subsequently by Devine that the bartender would provide no additional alcohol.

## **ARGUMENT**

### **I. KREUSER UNDERTOOK THE DUTY TO TRANSPORT DEVINE.**

Kreuser argues that, as a matter of law, there can be no duty upon him to transport Devine under any circumstances. Kreuser argues that this is contrary to the law of negligence in the State of Wisconsin. To support his argument, he presents a series of references to various principles regarding

foreseeability and duty. However, these principles are presented in such a way as to inaccurately reflect the true state of the law in Wisconsin.

In reality, Kreuser takes issue with this court's recent decision of *Gritzner v. Michael R.*, 2000 WI 68, 235 Wis.2d 781, 611 N.W.2d 906. Kreuser is actually arguing this court should reverse itself and reject the theory of negligence set forth in the *Restatement (Second) of Torts §324A*, Liability to Third Person for Negligent Performance of Undertaking. Kreuser seeks a rejection of this theory even though it has long been a part of the negligence landscape in the State of Wisconsin. (See *American Mutual Liability Ins. Co. v. St. Paul and Marine Ins. Co.*, 48 Wis.2d 305, 313-14, 179 N.W.2d 864, 868 (1970)). In addition, Kreuser seeks a rejection of this theory even though it was reaffirmed by this court a mere sixteen months ago in *Gritzner v. Michael R.*.

It is respectfully suggested that to support his position, Kreuser makes reference to and quotes from various cases in such a way as to create an inaccurate description of the law of negligence in this state. The primary problem with his description arises out of his analysis of "duty." Therefore, a brief recitation of law in this regard is required.

Wisconsin imposes a general duty all persons. Each person owes a general duty to all other persons to exercise ordinary care to prevent injury.

As set forth many years ago by this court: “[e]very person owes to all others a duty to exercise ordinary care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of his act.” (*Fitzgerald v. Ludwig*, 41 Wis.2d 635, 639, 165 N.W.2d 158, 160 (1969) [citation omitted]).

This duty is owed by each person to all others, even if the identity of the person or the nature of the harm is unknown. As set forth by the court:

As this court stated in *A.E. Investment Corp. v. Link Buildings, Inc.*, 62 Wis.2d 479, 483-84, 214 N.W.2d 764, 766 (1974), the proper analysis of duty in Wisconsin is as follows:

The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act . . .

*Rockweit v. Senecal, et al.*, 197 Wis.2d 409, 419-20, 541 N.W.2d 742, 747 (1995).

Kreuser argues that this general duty, however, does not require one to assume duties owed by another to a third person. This, it is argued, requires a rejection of the *Restatement (Second) of Torts* §324A liability and a reversal of this court’s decision in *Gritzner v. Michael R.* However, Kreuser’s argument in this regard is based upon a misreading of the law.

Kreuser refers to one sentence within *Dixon v. Wisconsin Health Organization Ins. Corp.*, 2000 WI 95, 237 Wis.2d 149, 612 N.W.2d 721, as supportive of his position. The statement is: “[t]his court has not adopted the Restatements provisions regarding the voluntary assumption of duties in evaluating negligence claims.” *Dixon v. Wisconsin Health Organization Ins. Corp.*, 2000 WI 95 ¶42. However, the affect Kreuser wishes to give to this statement is inconsistent with the affect it truly has upon well accepted principles of duty. It is the misunderstanding as to the effect of this phrase which creates confusion. This confusion is furthered by Kreuser’s inaccurate reproduction of the quotation from *Schuster v. Altenberg* set forth at p. 14 of his brief. When that portion of *Schuster* is accurately reproduced, it actually clarifies Wisconsin’s concept of duty and the voluntary assumption of another’s duty in such a way as to counter Kreuser’s position.

When accurately reproduced, the quotation within Kreuser’s brief should read as follows:

Under Wisconsin’s broad definition of duty, we need not engage in analytical gymnastics to arrive at our result by first noting that at common law, a person owes no duty to control the conduct of another person or warn of such conduct, and then finding exception to that general rule where the defendant stands in a special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of the conduct.



*Schuster v. Altenberg*, 144 Wis.2d 223, 239, n.3, 424 N.W.2d 159, 166 (1988). [emphasis added]. The portion quoted indicates that courts “. . . need not engage in analytical gymnastics. . . .” [emphasis added]. The quote within the Kreuser brief changes the meaning of the quotation by stating that courts “. . . do not engage in analytical gymnastics. . . .” [emphasis added].

Therefore, the accurate statement of law makes it clear that there is no need to struggle with the general concept of duty and, the rule that a person cannot be forced to accept a duty another owes to a third person when there exists a “special relationship.” This relationship is the basis for liability attaching when one chooses to undertake a duty owed by another. It is this voluntary undertaking that creates the special relationship which gives rise to the liability referred to in *Gritzner v. Michael R., American Mutual Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, and *Restatement (Second) Torts §324A*.

Kreuser’s reliance upon *Zelco v. Integrity Mutual Ins. Co.*, 190 Wis.2d 74, 327 N.W.2d 357 (Ct. App. 1994), is similarly misplaced. *Zelco* was argued to this court in *Gritzner v. Michael R.* to support a rejection of this theory of liability. This court rejected the *Zelco* analogy by properly recognizing that there were no factual allegations to suggest that there was a “special relationship” between the social host and her guests. (*Gritzner v. Michael R.*, 2000 WI 68 ¶61 n.15).

In this case, a special relationship was created when Kreuser voluntarily undertook Devine's duty owed to third parties. The facts in this case dovetail precisely with that which is required to support the theory of negligence set forth in *Restatement (Second) of Torts* §324A. As set forth by this court:

This court has adopted the theory of negligence set forth in the *Restatement (Second) of Torts* §324A, Liability to Third Person for Negligent Performance of Undertaking. See *American Mut. Liab. Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 48 Wis.2d 305, 313, 179 N.W.2d 864 (1970) (expressing agreement with the rule of law set forth in §324A). Section 324A provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to a third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

This rule does not require a contractual or legal obligation to provide services. *American Mut. Liab.*, 48 Wis.2d at 313, 179 N.W.2d 864. Instead, this standard of conduct applies to anyone 'who, having no duty to act, gratuitously undertakes to act and does so negligently.'

(*Gritzner v. Michael R.*, 2000 WI 68, ¶56). [emphasis added].

In a final attempt to escape liability, Kreuser argues that the rules of law set forth in *Gritzner* can only apply in a situation where one party stands *in loco parentis* to another. This is a misreading of *Gritzner*. *Gritzner* set forth two bases upon which liability could be established under the facts presented. One was if the individual stood *in loco parentis*. (*Gritzner v. Michael R.*, 2000 WI 68, ¶54). The other was if the conduct came within the standards set forth in *Restatement (Second) of Torts §324A*. (*Gritzner v. Michael R.*, 2000 WI 68, ¶55).

Neither the trial court nor the Court of Appeals based their denials of Kreuser's motion for summary judgment upon a finding that he stood *in loco parentis* to Devine. Their denials were based entirely upon the application of *Restatement (Second) Torts §324A* as sanctioned by this court. As a consequence, the Court of Appeals in this case did nothing more than take a set of facts, review a well-established theory of negligence and, concluded that summary judgment was not applicable. The Court of Appeals decision does not rule, as a matter of law, that Kreuser will be found liable. That will be left to the fact-finder.

Further, requiring Kreuser to respond to a theory of negligence under the facts of this case will not result in the exaggerated scenarios postulated within his brief. There is nothing within the Court of Appeals decision nor,

§324A, that requires anyone to drive anyone else anywhere. A similar attempt to alarm the court was made in *Gritzner v. Michael R.* In response, this court stated:

Likewise, the claim for negligent failure to control under the *Restatement (Second) of Torts* §324A is well defined; it will not succeed unless Bubner voluntarily agreed to take care of Tara and failed to take reasonable care to do so.

*Gritzner v. Michael R.*, 2000 WI 68 ¶62.

In this case, as in all cases, liability cannot attach unless an individual voluntarily agrees to accept another's duty pursuant to the well defined criteria set forth within §324A. Therefore, none of the scenarios of liability argued by Kreuser could occur. The Court of Appeals did nothing more than take a well-established rule of law, review a set of facts against its standards and, concluded a jury issue is presented. It's decision should be affirmed.

## **II. LIABILITY AGAINST KREUSER IS NOT PRECLUDED BY PUBLIC POLICY CONSIDERATIONS.**

Kreuser raises, for the first time before this court, a public policy argument. Generally, an issue raised for the first time on an appeal will not be considered. As set forth by the court:

The practice of this court is not to consider an issue raised for the first time on appeal.

In *Cappon v. O'Day* (1917), 165 Wis. 486, 490, 162 N.W. 655, 657, this court pointed out:

‘The reason for the rule is plain. If the question and been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof.’

The adoption of a new rule of law on appeal when the question was not raised at trial might well work hardship on the adversary. It would also deprive this court of the informed thinking of the trial judge on the matter.

*Terpstra v. Soiltest, Inc.*, 63 Wis.2d 585, 593, 218 N.W.2d 129, 133 (1974).

Moreover, public policy consideration should, typically, wait jury consideration. (*Padiella v. Bydalek*, 56 Wis.2d 772, 779-80, 203 N.W.2d 15, 19 (1973) [citation omitted]).

Even when analyzing the Court of Appeals decision against public policy considerations, it is clear that Kreuser’s potential liability is appropriate. Public policy considerations have been repeatedly limited to six areas of concern. As set forth by the court:

The public policy reasons that may preclude liability include: (1) the injury is too remote from the negligence, (2) the injury is too wholly out of proportion to the tortfeasor’s culpability, (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm, (4) allowing recovery would place too unreasonable a burden on the tortfeasor, (5) allowing recovery would be too likely to open the way for fraudulent claims, and (6) allowing recovery would enter a field that has no sensible or just stopping point.

*Gritzner v. Michael R.*, 2000 WI 68 ¶27 [citation omitted].

Kreuser fails to clearly articulate which of the considerations are at issue. However, it would appear that he attempts to take advantage of the “unreasonable burden” and “no sensible stopping point” considerations.

In addition, he spends a considerable amount of space arguing that, in his opinion, it is grossly inequitable to hold him liable while providing immunity pursuant to Wis. Stat. §125.035. (See, Brief and Appendix of Defendants-Appellants, pp. 22-24). Public policy considerations do not include a consideration whereby one tortfeasor can claim he is unfairly treated in comparison to another. Every tortfeasor could concoct an argument whereby his liability is considered unfair when compared to others’. Public policy cases do not accept such an argument for the obvious reason. Courts would be overwhelmed with endless claims of inequity by tortfeasors seeking to compare the nature and extent of their liability with the nature and extent of other tortfeasors.

Moreover, one could turn Kreuser’s argument around. It could be claimed that it is the §125.035 immunity that should be repealed to remedy the “gross inequity.” Clearly, such an argument, like the contrary argument presented by Kreuser, has no place in a public policy analysis.

With respect to the “unreasonable burden” and “no sensible stopping point” arguments, this court need only refer to its recent decision of *Gritzner*

*v. Michael R.* When analyzing the tortfeasor's conduct in light of a claim of "too unreasonable of a burden" this court held:

Similarly, if the plaintiffs proceed under the second theory, they will not succeed unless Bubner agreed to care for Tara while she was in his home and then failed to exercise ordinary care to protect her from Michael. This burden is also a reasonable one.

*Gritzner v. Michael R.*, 2000 WI 68, ¶¶67. As in *Gritzner*, Kreuser's burden is not unreasonable. It would not exist unless he first agreed to transport Devine and then failed to exercise ordinary care in so doing. The lynchpin, therefore, of his liability is his informed and deliberate agreement to undertake the duty to transport Devine. If he merely stood by saying and doing nothing, he would have had no duty in this regard. The fact that he undertook this duty and then, allegedly, failed to exercise ordinary care in its execution, creates liability. As in *Gritzner*, this burden is a reasonable one.

The reasonable nature of this burden is illustrated by the serious consequences of his conduct. The record establishes that the bartender noticed Devine's extreme state of intoxication. She then formed the conclusion that he could not drive from the gathering. He would pose a danger to other highway users. As she stated: "I'm being very serious. This man needs a ride home. He cannot leave this Country Club in this condition." (R.30:91-92; R.Ap. 130-131). In response to this, she testified that Kreuser stated, "[d]on't

worry, I will give him a ride.” She then inquired further, “[a]re you sure?”, to which Kreuser replied, “I promise I’ll give him a ride home.” After receiving this assurance, the bartender reasonably concluded that she took care of the dangerous situation and, went about the business of cleaning up her station. (R.30:91-91; R.Ap. 130-131).

It is reasonable to hold Kreuser liable in this case given the fact that his promise to undertake the responsibility of transporting Devine interrupted a process whereby a ride was going to be provided. Without dispute, president and CEO of UMI, Stanley Krueger, testified that his company was prepared to provide a ride home to any attendee who had become intoxicated. The bartender’s stated intention that Devine needed a ride home and, could not drive from the Country Club in his condition, demonstrated her intent to find him a ride. It is reasonable to conclude that if Kreuser did not make the promise to undertake this duty, other members of the UMI staff would have. Given the fact that the bartender stated she was “very serious” and that Devine could not drive from the gathering in that condition, it is reasonable to conclude that additional attempts to find a ride would have followed. Kreuser interrupted that process when he agreed to undertake this duty. It cannot be considered unreasonable to hold him liable under these circumstances when, by his promise to undertake this duty, he interrupted a process which would



have resulted in Devine getting a ride from another responsible UMI staff member. Had that been allowed to occur, this accident would not have happened.

With respect to the “no sensible stopping point” argument, this court has addressed that issue with respect to §324A as well. As set forth by this court:

Under the *Restatement (Second) of Torts* §324A, only people who voluntarily undertake to provide services and then fail to exercise ordinary care in the performance of those services may be held liable for negligent failure to control. Thus, both theories provide just and sizable guidelines for limiting liability.

*Gritzner v. Michael R.*, 2000 WI 68, ¶65. Kreuser’s presentation of various factual scenarios which he claims will be effected by the Court of Appeals decision cannot withstand closer scrutiny. As this court recognized in *Gritzner v. Michael R.*, the theory of negligence set forth in §324A is specifically limited to one type of tortfeasor. It is limited to those who “voluntarily undertake” another’s duty.

Kreuser ignores this limitation when as he presents his alarmist factual scenarios.” To state it another way, Kreuser ignores the limitation of that requires a “voluntary undertaking” and then argues that the Court of Appeals should be reversed in that it’s decision has no limits.

When §324A is properly analyzed, it presents a well-defined guideline for imposing liability. As set forth by this court:

. . . under the Restatement (Second) of Torts §324A, Bubner voluntarily agreed to take care of Tara in his home and then failed to take reasonable care to supervise and control Michael's conduct for Tara's protection. We conclude that these legal theories provide narrow, well-defined guidelines for evaluating Bubner's alleged negligent failure to control Michael's conduct.

*Gritzner v. Michael R.*, 2000 WI 68, ¶58. Given the narrow, well-defined guidelines for §324A liability, Kreuser's examples of future problems must be considered alarmist and, more than a little disingenuous. They all require one to ignore the limiting factor necessary in all §324A cases. That factor is the voluntary agreement to assume another's duty when an individual otherwise would not have to. §324A has no application to any person at a "company party, backyard barbeque, awards banquet or professional sports event" unless that individual voluntarily undertakes a duty owed by another. Moreover, undertaking that duty does not result in automatic liability. That person need only exercise ordinary care in the discharge of that duty to escape liability. Therefore, one need do nothing more than what would have been required by the individual whose duty he undertook. Arguing that this case creates a pernicious new form of tort is mere hyperbole.

This decision will have a desirous effect upon designated drivers programs. If a party is going to undertake the duty to transport an inebriated individual, tort law should require him to exercise ordinary care in discharging that responsibility. A situation where a designated driver accepts a duty and then secretly changes his mind and abandons the inebriated is worse than if the duty was not accepted in the first place. If that individual did not accept the duty, the inebriated would have the opportunity to arrange alternate transportation. Therefore, this decision should make it clear to designated drivers that if they undertake the duty, they must discharge it with ordinary care.

Kreuser's example regarding the taxi driver is unpersuasive. In order to be an analogous to the situation at hand, the taxi driver would have had been made aware of the passenger's extreme state of inebriation, promised to make certain the inebriated would not drive and then, decided without informing anyone, that he would not show up. However, a taxi driver merely responding to a call does not accept the duty to see that the caller does not operate a vehicle upon the roadways if the caller decides to reject the ride by growing impatient. More is necessary to allow an accurate analogy.

Public policy consideration do not preclude Kreuser's liability.

### **III. WIS STAT. §125.035 DOES NOT PROVIDE IMMUNITY TO KREUSER.**

This appeal arises out of a denial of Kreuser's summary judgment. As a consequence, summary judgment methodology must be applied. This methodology is well known. As set forth by the court:

Summary judgment methodology is governed by §802.08, Stats., and we apply that methodology in the same manner as the trial court. *Allied Ins. Center, Inc. v. Wauwatosa Savings & Loan Ass'n*, 200 Wis.2d 369, 375, 546 N.W.2d 544, 546 (Ct.App. 1996). If the pleadings state a claim for relief and the responsive pleadings join the issue, we must examine the summary judgment submissions to determine whether they set forth specific evidentiary facts to demonstrate a genuine issue for trial.

Additionally, we apply a de novo standard of review when called upon to review a trial court's interpretation and application of a statute.

*Larson v. Kleist Builders, Ltd.*, 203 Wis.2d 341, 345, 553 N.W.2d 281, 283 (Ct. App. 1996).

Even if the facts are undisputed, if reasonable, alternative inferences can be drawn, summary judgment is inappropriate. (See, *Fisher v. Doyles Town Fire Department*, 199 Wis.2d 83, 87-88, 543 N.W.2d 575, 577 (Ct. App. 1995)). Any inferences that may be drawn, must be resolved in favor of the party against whom the motion is brought. (See, *Williamson v. Stecko Sales, Inc.*, 194 Wis.2d 608, 624, 530 N.W.2d 412, 419 (Ct. App. 1994). Finally, the

review is *de novo* without any deference to the trial court's decision. (See, *Sequist v. Physicians Insurance Company of Wisconsin*, 192 Wis.2d 530, 540, 531 N.W.2d 437, 440 (Ct. App. 1995).

Therefore, when analyzing the record in this case, all competing facts and reasonable inferences from those facts should be resolved in favor of Stephenson.

Kreuser argues that his §324A liability is prohibited by Wis. Stat. §125.035 immunity. The only way he can make such an argument is to claim that the trial court denied his motion for summary judgment and liability is now sought as a consequence of him "procuring" alcohol for Devine. In other words, he must take the position that his liability arises out of his procurement of alcohol for Devine so he can then seek refuge in Wis. Stat. §125.035. A review of the record and the trial court's decision makes it is clear that procurement of alcohol plays no part in his liability. There is no reference within the trial court's decision that Kreuser's conduct resulted in the additional consumption of alcohol. Moreover, there is no support within the record to conclude that Devine consumed alcohol after Kreuser's voluntary undertaking.

The bartender specifically states that she served him no further alcohol. Kreuser acknowledges that at approximately 9:00 p.m., he was informed by

Devine that the bartender cut him off. The only facts that suggest additional consumption comes from Kreuser's testimony that Devine took three drinks back to his table. However, there is no direct testimony by Kreuser or any other individual establishing that it was Devine who consumed these drinks. Simply taking three drinks back to the table he was sitting at with dinner companions does not constitute proof that the three drinks were for him. Moreover, when resolving all disputes and inferences in favor of Stephenson, it is clear that the records lends no support to Kreuser's desire to transform his "voluntary undertaking" liability to "procurement" liability.

The trial court decision and, that of the Court of Appeals, makes no reference to Kreuser's conduct resulting in the "procuring" of additional alcohol. The trial court's decision is limited specifically to the facts necessary to establish §324A liability. The court's analysis of the record and its application of the applicable law lies only with that theory of negligence. No where within the court's decision in there reference to Kreuser's voluntary undertaking resulting in additional procurement of alcohol. (R.48:32-37; R.Ap. 132-137).

The fact that there are no findings regarding additional consumption is not surprising. Stephenson did not argue in opposition to Kreuser's motion that additional consumption occurred. Stephenson's opposition was limited

to §324A liability arising out of his voluntary undertaking to transport Devine. (R.29:26-27; R.Ap. 103-104).

The only basis upon which Kreuser can make the argument that liability must arise out of the procurement of alcohol is a reference to Stephenson's amended complaint. In that complaint, Stephenson plead alternate claims for relief against Kreuser. One set of allegations would require the procurement of alcohol to create liability. The other set does not. Those that do not relate specifically to the §324A theory of negligence. Those paragraphs are:

39. The defendant, John H. Kreuser, voluntarily assumed a duty to drive the deceased, Michael T. Devine, home from the gathering referred to herein, so that he would not operate a motor vehicle upon the roadway in an impaired state.
43. Through his conduct and assurance, the defendant, John H. Kreuser, created a special relationship and/or circumstance between he and Michael T. Devine whereby said defendant had a duty to exercise ordinary care in taking reasonable precautions to prevent Michael T. Devine from driving from the meeting referred to herein in an impaired state.
45. The defendant, John H. Kreuser, was negligent with respect to the breach of said duty, with said negligence being a substantial and proximate cause of Michael T. Devine operating a vehicle upon the roadway in an impaired state, causing the collision referred to herein.
46. The negligence of the defendant, John H. Kreuser, was a substantial and proximate cause of the personal injury and wrongful death of Kathy M. Stephenson, thereby causing

damage to the plaintiffs herein.

(R.12; A-Ap. pp. 122-123).

A party may plead claims alternatively or, hypothetically, in a complaint. In fact, alternate claims may be stated regardless of whether they are consistent with each other. (*See* Wis. Stat. §802.02(5)(b). Pleadings are to be construed so as to do substantial justice. (*See* Wis. Stat. §802.02(6)). Kreuser has been aware at all times that a §324A claim was presented.

Stephenson's claims involving the procurement of additional alcohol would have been viable had Kreuser either failed to plead or, chosen to forego his affirmative defense of immunity. In that immunity was raised, that theory of liability can no longer proceed. However, those allegations which support a determination of liability pursuant to §324A can. This was the only theory presented for consideration by the trial court in opposition to Kreuser's motion. It was upon this theory of negligence that the trial court denied Kreuser's motion.

Under the circumstances, Kreuser is entitled to and, Stephenson would consent to a pretrial order whereby there could be no attempt to introduce any evidence that Devine consumed any additional alcohol after Kreuser undertook the duty to transport.



The fact that Kreuser's attempt to make the remaining claims of negligence something other than what they actually are, should be rejected. To illustrate this point further, if the trial court ruled that there could be absolutely no evidence or inferences that Kreuser's conduct was in any way connected to Devine's consumption of alcohol at any time during the company function, the §324A theory of negligence would remain viable.

Section 125.035 provides no immunity to Kreuser in that his liability is unrelated to the procurement of alcohol, in any fashion, for Devine.

### **CONCLUSION**

For the reasons set forth above, the Court of Appeals decision should be affirmed.

Dated this 15<sup>th</sup> day of October, 2001.

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## **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,336 words.

Dated this 15<sup>th</sup> day of October, 2001.

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## APPENDIX

	Record	Appendix
Plaintiff's Brief in Response to Defendants' Motion for Summary Judgment .....	R.29:24-27	R.Ap. 101-104
Deposition, Stanley Krueger, December 20, 1999 .....	R.30:3, 23	R.Ap.105-106
Deposition, John Kreuser, December 20, 1999 .....	R.30:65-67	R.Ap.107-109
.....	R.30:69-80	R.Ap.110-121
Inquest Testimony, James R. Oehldrich, February 17, 1999 .....	R.30:82-85	R.Ap.122-125
Inquest Testimony, Marge Kubowski, February 17, 1999 .....	R.30:87-92	R.Ap.126-131
Oral Decision, Judge Victor Manian, April 3, 2000 .....	R.48:32-37	R.Ap.132-137

head John Kreuser. As a consequence, UMI knew, or should have known, of the likelihood of his intoxication at the December, 1998 function. The facts established that UMI was prepared to accept the responsibility to prevent Mr. Devine from operating intoxicated upon the roadways. As testified by CEO Krueger:

Q Okay. But then to follow up on your last answer, is it your testimony that had you become aware of someone at the party drinking too much that arrangements would have been made to drive that person home safely?

A That type of an offer would have been made, yes.

Q And it would have been made by UMI staff to its employees who may have overindulged had that been something known?

A Well, by people -- responsible people that would have been there, yes.

Q And that would have included yourself, of course?

A Yes.

(See Aff. Ex. A-21).

CEO Krueger acknowledged during this testimony that an offer to drive a person home safely would have been made by UMI staff, *i.e.*, "responsible people." Therefore, UMI undertook the responsibility to see that its employees would have a ride home if it became aware of their intoxication. Therefore, the only factual question is whether UMI was aware, or should have been aware. This is a jury question.

UMI's liability under this claim is based upon Restatement (Second) Torts 2d, sec. 324A.

Liability to Third Person for Negligent Performance of Undertaking. The Restatement states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if.

(a) his failure to exercise reasonable care increases the risk of such harm, or

- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

As a consequence, the law places upon UMI a duty to follow through once it acknowledges that it is prepared to undertake a service to intoxicated employees for the protection of a third-party. The question is whether UMI breached this duty by failing to exercise reasonable care.

This cause of action also does not run afoul of sec. 125.035. In Otis Engineering Corporation v. Larry Clark, 668 S.W.2d 307 (1993), the court addressed a situation where an employee became intoxicated on the job. The employee was placed into his vehicle by management and drove from the work place. An accident subsequently occurred. This case will be quoted at length to set forth the rationale behind this cause of action. As set forth by the court:

An employer was held liable for injuries sustained by third parties in an accident caused by its intoxicated employee in Brockett v. Kitchen Boyd Motor Co., 264 Cal.App.2d 69, 70 Cal.Rptr. 136 (1968). The employee, Huff, became intoxicated at a Christmas party given by the motor company. Although Huff was "grossly intoxicated," a representative of the company placed him in his automobile and directed him to drive home. The court recognized that the supplying of alcohol does not ordinarily make the supplier liable to an injured third party, but the affirmative acts of placing him in his car and directing him to drive home imposed a duty on the company to exercise reasonable care.

Recently, the Supreme Court of Appeals of West Virginia rendered its opinion in Robertson v. LeMaster, 301 S.E.2d 563 (W.Va. 1983). In that case, LeMaster's employer, The Norfolk and Western Railway Company, had required LeMaster to work twenty-seven consecutive hours to remove debris and repair a track damages by a train derailment. After many complaints by LeMaster that he was tired and wanted to go home, LeMaster's foreman permitted him to do so. LeMaster lived some fifty miles from his place of work, and while driving his own car home, fell asleep and was involved in a collision with Robertson, causing injuries to Robertson. The West Virginia court recognized that the railroad company owed no duty to control an employee acting outside of the scope of employment, but stated that such was not the issue in the case, saying "rather it is whether the appellee's conduct prior to the accident created a foreseeable risk of harm." The court concluded that requiring LeMaster to work such long hours and then setting him loose upon the

highway in an obviously exhausted condition was sufficient to sustain a cause of action against the railroad. We are persuaded by the logic of the holdings in these three cases.

Therefore, the standard of duty that we now adopt for this and all other cases currently in the judicial process, is: when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others. Such a duty may be analogized to cases in which a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons.

Otis Engineering Corporation v. Larry Clark, 668 S.W.2d 307, 310-11 (1993). [emphasis added].

Therefore, this cause of action is not subject to sec. 125.035. This duty exists whether an individual is intoxicated, sober or, simply overtired. If Michael Devine drank no alcohol but, under similar circumstances, exhibited signs that would present a danger on the roadway due to being overtired and, UMI indicated that it was willing to undertake the responsibility to see that it's overtired employees would be given a ride home, a similar claim would exist.

UMI's liability is also premised upon the conduct of John Kreuser, a member of its staff. The facts involving defendant Kreuser's undertaking of the responsibility to drive Mr. Devine home are without dispute. With respect to UMI, the issue is whether Mr. Kreuser was within the scope of his employment as a department head for UMI, when he so acted. If this function is found to be within the scope of employment, then its department head, John Kreuser, is as well.

Additional facts support a conclusion that defendant John Kreuser was within the scope of his employment when he undertook to see Michael Devine home safely. UMI, through its CEO, acknowledged that if it became aware that an individual had become intoxicated, UMI staff members, *i.e.*, "responsible people," would provide a ride home. John Kreuser is a member of the

UMI staff. He is among the "responsible people" referred to by CEO Krueger. He, without dispute, made the offer to drive Mr. Devine home. This is precisely what was intended by UMI. If UMI became aware of an individual who was intoxicated, it would undertake to prevent harm to third-persons by seeing that individual safely home.

The master-servant relationship is established under these circumstances. As set forth within Restatement (Second) Agency 2d Sec. 225. Person Serving Gratuitously; "One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services." Further, Restatement (Second) Agency 2d Section 221, Master's Consent to Service, states; "To constitute the relation of master and servant, the one for whom the service is rendered must consent or manifest his consent to receive the services as a master." UMI has acknowledged it would not only have consented to, but would have offered the ride home. John Kreuser, was a member of the staff. He volunteered to render this service. A jury question is presented as to whether these facts create the master-servant relationship.

#### **IV. THE FIFTH CAUSE OF ACTION PRESENTS A CLAIM AGAINST JOHN KREUSER.**

The fifth cause of action is similar to the fourth cause of action, but applies to John Kreuser if the jury determines that he was not within the scope of his employment when he gratuitously undertook to see Michael Devine home safely.

The court's in Wisconsin have acknowledged that an individual can be held liable under these facts. As set forth within Gritzner v. Michael R., 228 Wis.2d 541, 598 N.W.2d 282 (Ct.App. 1999), the court acknowledged that Restatement (Second) Torts Section 324A had been adopted by the Wisconsin Supreme Court in American Mutual Liability Insurance Company v. St. Paul Fire and

1           those two vice presidents. Can you give me then a  
2           description of the chain of command, if you will,  
3           below the vice president at the UMI in December of  
4           1998? Do you understand my question?

5       A    People that are responsible, different departments  
6           type thing?

7       Q    Yeah. Let me put it to you this way because I've  
8           reviewed the transcript so I know a lot of this  
9           information, I think. I just want to confirm a few  
10          things with you. Is it true in December of 1998  
11          that beneath the vice president in the chain of  
12          command, if you will, would be the various  
13          department heads at UMI?

14      A    I think -- yeah, that's a fair statement.

15      Q    How many department heads existed back in December  
16          of 1998?

17      A    Probably same as now.

18      Q    How many is that?

19      A    Engineering QA is one, human resources is one,  
20          accounting is another.

21      Q    Anything else?

22      A    That's it.

23      Q    The head of the engineering department was John  
24          Kreuser?

25      A    Correct.



1           would have given assistance should it ever have  
2           arisen.

3       Q    All right.  So to follow up on your answer, you  
4           don't recall, prior to this party, thinking in your  
5           mind that arrangements should be considered for  
6           someone who may have overindulged at one of these  
7           parties on alcohol?

8       A    Well, we were at a public place --

9       Q    Uh-huh.

10      A    -- and we, as a company, were limiting that  
11           possibility through the use of beverage tickets.  
12           So beyond that, no, we did not.

13      Q    Okay.  But then to follow up on your last answer,  
14           is it your testimony that had you become aware of  
15           someone at the party drinking too much that  
16           arrangements would have been made to drive that  
17           person home safely?

18      A    That type of an offer would have been made, yes.

19      Q    And it would have been made by UMI staff to its  
20           employees who may have overindulged had that been  
21           something known?

22      A    Well, by people -- responsible people that would  
23           have been there, yes.

24      Q    And that would have included yourself, of course?

25      A    Yes.

- 1       A     There had been a previous Christmas party where he  
2            had -- he fell asleep at the bar and I gave him a  
3            ride home.
- 4       Q     And which Christmas party was that?
- 5       A     My guess would be '95, perhaps.
- 6       Q     Do you know where that was held?
- 7       A     That was at Silver Spring.
- 8       Q     Was it the Tremont Room or a different room?
- 9       A     No, it was a different room.
- 10      Q     And you say he fell asleep at the bar --
- 11      A     It was the main bar.
- 12      Q     Okay. You answered my question. But it would have  
13            been the main bar at the country club, not a bar  
14            that might have been set up in the room where the  
15            UMI party was; is that accurate?
- 16      A     Yes.
- 17      Q     And I'm trying to picture this. Are you telling me  
18            that it was a situation where Mike was face down on  
19            the bar asleep?
- 20      A     Yes.
- 21      Q     Any other occasions at any other functions where  
22            Mike Divine drank to excess, other than that one,  
23            prior to December 4th of '98?
- 24      A     No.
- 25      Q     How is it that you discovered him asleep at the bar

1 Q Okay, all right. So back in 1995, that's the year  
2 you think it's approximately occurring, this  
3 previous Christmas party, were you at that party  
4 with your wife at that time?

5 A Yes.

6 Q Same -- that's Debra?

7 A Yes.

8 Q And I think you testified that you gave Mike a ride  
9 home that evening?

10 A Yes.

11 Q Where was he living?

12 A Eagle.

13 Q Did he drive to the country club that evening?

14 A I don't know if he had driven or not but his  
15 vehicle was there.

16 Q All right. So the vehicle was left behind and you  
17 gave him a ride home?

18 A Actually I drove his vehicle, my wife followed me  
19 with our car.

20 Q Okay. And did he ride with you or your wife?

21 A No, he rode with me.

22 Q Okay. Did he object to you giving him a ride in  
23 that fashion that evening?

24 A No, he did not.

25 Q How is it that you were the one within this group

1 to give Mike a ride home?

2 A 'Cause I'm just too, too nice a guy.

3 Q Was there any discussion among people there about,  
4 "This guy needs a ride home" and who's going to do  
5 it or did you just volunteer? I'm just trying to  
6 find out --

7 A I think I just went ahead and did it.

8 Q Okay. Mike Divine's falling asleep at the bar that  
9 evening, you understood that -- you understood that  
10 to be the result of drinking too much?

11 A That and lack of sleep.

12 Q Have you ever given Mike a ride -- Mike Divine a  
13 ride home from anything else? Whether it's a  
14 company function or social gathering, anything  
15 where you believe he drank too much so you gave him  
16 a ride home?

17 A There was one occasion at a birthday party where I  
18 did, yes.

19 Q That was a private birthday party?

20 A Yes.

21 Q And when did that occur?

22 A Oh, I'd say 1998.

23 Q And when in relation to the December 4th Christmas  
24 party?

25 A That would have been before.

1 more than one that evening for UMI?

2 A I only recall seeing one.

3 Q Female?

4 A Yes.

5 Q All right. You had contact -- you came in contact  
6 with Mike Divine then after the awards portion of  
7 the evening, correct?

8 A Yes.

9 Q And I think you just testified a moment ago you  
10 were at the bar in the party room when that  
11 occurred, correct?

12 A Yes.

13 Q Tell me about what happened?

14 A I had been standing with my back to the bar, I was  
15 talking to my wife and another couple and I  
16 overheard the conversation of Mike had gone up --  
17 evidently he had approached the bar to buy several  
18 drinks and the bartender had asked if he had  
19 someone that was going to take him home.

20 Q You overheard that?

21 A Yes, I did.

22 Q How far do you think you were standing from Mike  
23 Divine when he had the conversation with the  
24 bartender?

25 A Well, he had been standing right next to me but he

1           was facing the bar and I was facing away from the  
2           bar.

3       Q     I see. So he was within three feet when he had  
4           this conversation?

5       A     Yes.

6       Q     So you overheard clearly what the bartender said to  
7           him?

8       A     Yes.

9       Q     And she asked him if he had a ride home?

10      A     Yes.

11      Q     Did you hear her saying anything else to him where  
12           she commented upon his state of inebriation, if you  
13           want to use that term?

14      A     No.

15      Q     Simply, "Do you have a ride home?"

16      A     Yes.

17      Q     What did you understand that to mean coming from  
18           the bartender?

19                   MR. FREDERICKS: Foundation. Calls for  
20           speculation.

21   BY MR. BERTLING:

22      Q     I'm just asking what you thought she meant by that?

23                   MR. FREDERICKS: Go ahead.

24                   THE WITNESS: I believe designated  
25           driver.

1 BY MR. BERTLING:

2 Q Did you conclude from what she said as a bartender  
3 that she was questioning whether or not she felt he  
4 was sober enough to drive home safely?

5 MR. FREDERICKS: Same objection. Go  
6 ahead.

7 THE WITNESS: Yes.

8 BY MR. BERTLING:

9 Q What I said was accurate, correct? What I said was  
10 accurate? I'm just clarifying that because of the  
11 objection, I want to make it clear. What I said is  
12 accurate, that is what you took her statement to  
13 mean?

14 A She was questioning his condition, yes.

15 Q And this was about what time of evening?

16 A I'm guessing around 8:30.

17 Q Okay. Up until that point in time did you come to  
18 the conclusion from any source that Mike had drank  
19 too much to drive home safely?

20 A No.

21 Q Did you hear anybody commenting upon how much he  
22 drank that evening?

23 A No.

24 Q Prior to that point?

25 A No.

1 Q Okay. After hearing the bartender ask Mike Divine  
2 whether he had a ride home, what did you do?

3 A I had just turned to see what was going on, more or  
4 less, and Mike had made a motion like I was it.

5 Q All right. And he made a motion with his head?

6 A Yes.

7 Q So you interpreted his motion to be a signal to the  
8 bartender to you that you were his ride home?

9 A Uh-huh.

10 Q Is that a yes?

11 A Yes.

12 Q So you saw him do that?

13 A Yes.

14 Q And she was looking at him when -- the bartender  
15 was looking at him when he did that?

16 A Yes.

17 Q And what did you do in response to that?

18 A I just nodded my head.

19 Q To who?

20 A To the bartender.

21 Q And by nodding your head you were indicating to the  
22 bartender that you were going to give him a ride  
23 home, correct?

24 A Yes.

25 Q And you understood by nodding to the bartender then



1           around, to be real truthful.

2       BY MR. BERTLING:

3       Q     Your testimony a moment ago was that by nodding to  
4           her you intended to give him a ride home, correct?

5       A     Yes.

6       Q     So when you nodded to her you weren't kidding  
7           around about that fact, you were, in your mind,  
8           accepting the responsibility of giving him a ride  
9           home to her, correct?

10           MR. FREDERICKS: Object to form and  
11           foundation. Go ahead. Also mischaracterizing and  
12           misstating his testimony. Go ahead.

13           THE WITNESS: I did not -- I did not  
14           think the conversation was serious at that point.  
15           The way you had phrased the questions to me before,  
16           I was answering your question based on your  
17           question.

18       BY MR. BERTLING:

19       Q     By nodding to the bartender at that point, in your  
20           mind, you were thinking, "I'm going to give Mike  
21           Divine a ride home," that's accurate, correct?

22       A     Yes.

23       Q     And that was the purpose for nodding to the  
24           bartender was to give her that signal, correct,  
25           that this was your intent?

1 A Yes.

2 Q Did he -- strike that. Did she serve him the  
3 drinks at that point in time?

4 A Yes.

5 Q Do you know how many drinks there were?

6 A I thought there were three.

7 Q Do you recall what they were?

8 A I believe it was a glass of wine, a bloody Mary--  
9 maybe there was two drinks. I only recall a glass  
10 of wine and a bloody Mary.

11 Q Do you know who Mike was with at that time?

12 A No, I do not. But he did go back to his table.

13 Q All right. The table he had eaten at?

14 A Yes.

15 Q Did Mike appear intoxicated at that point to you?

16 MR. FREDERICKS: Asked and answered.

17 THE WITNESS: No.

18 BY MR. BERTLING:

19 Q Now, on December 4th of 1998, you were a department  
20 head, correct?

21 A Yes.

22 Q When you intended to give Mike a ride home did you  
23 give this -- did you formulate this intention and  
24 give this signal to the bartender that you would do  
25 that as a department head for UMI?

1 MR. REID: Object to the form.

2 THE WITNESS: No.

3 BY MR. BERTLING:

4 Q You were doing that individually?

5 A Yes.

6 Q Did you have any other contact with Mike Divine  
7 after that, after he went back to his table with  
8 these drinks?

9 A Yes.

10 Q And what happened, tell me the circumstances of  
11 that?

12 A I believe it was around 9:00 or 9:15 he had asked  
13 me to buy him a drink.

14 Q Were you still at the same -- approximately the  
15 same spot as you were before?

16 A No.

17 Q Where were you at this time -- this point?

18 A I was out in front, to the side of the bar talking  
19 with different people.

20 Q All right. You were still in the party room for  
21 the --

22 A Yes.

23 Q And so Mike came up to you and asked you if you'd  
24 buy him a drink?

25 A Yes.

1 Q How did he appear at that point insofar as his  
2 state of intoxication?

3 A Didn't seem that bad.

4 Q Did he seem at all intoxicated to you? Meaning,  
5 did you see anything about him that made you think  
6 that this guy had been drinking?

7 A Well, I could tell he was drinking, just -- you  
8 could smell it on him but, I mean, he wasn't  
9 slurring his words or falling down or anything like  
10 that.

11 Q So his speech seemed normal to you?

12 A Yes.

13 Q And he didn't appear to have any problems moving  
14 about? I mean, he wasn't stumbling or having  
15 difficulty, as you recall?

16 A Not when I seen him.

17 Q Okay. And did he appear steady on his feet when he  
18 was talking to you, if you recall?

19 A Yes.

20 Q When he asked you to buy him a drink did you  
21 question why he was asking you to do that?

22 A I didn't question him at all. I think he  
23 volunteered the information.

24 Q What did you hear?

25 A Well, he told me that the bartender wouldn't serve

1 him.

2 Q The bartender cut him off?

3 A Yes.

4 Q Did you ask him why he was cut off?

5 A No.

6 Q Did you conclude on your own why she cut him off --  
7 strike that. What did you conclude was the reason  
8 she cut him off?

9 MR. FREDERICKS: Form and foundation.  
10 Go ahead.

11 THE WITNESS: Maybe the time lapse  
12 between the prior occasion. And that's an  
13 assumption on my part that it was the same  
14 bartender he was talking about.

15 BY MR. BERTLING:

16 Q All right. Can you tell me whether the same  
17 bartender was in the room at the bar as there was  
18 -- as was there when you nodded?

19 A No, I couldn't attest to that.

20 Q Did you conclude, when you were informed that he  
21 had been cut off, that he was cut off because a  
22 bartender concluded that he shouldn't drink any  
23 more alcohol that night given the state of his  
24 inebriation?

25 MR. FREDERICKS: Form and foundation. Go

1           don't have a recollection of him being in the room  
2           any more that evening, correct?

3       A     Yes.

4       Q     What time did you leave the party?

5       A     I want to say ten o'clock.

6       Q     The last time you saw Mike Divine, at about 9:00 to  
7           9:15, did you indicate to him that you would not be  
8           giving him a ride home?

9       A     No.

10      Q     After nodding to the bartender did you ever  
11           indicate to Mike Divine that you would not be  
12           giving him a ride home?

13      A     No.

14      Q     Did you tell anybody at the party, whether they  
15           were staff of Silver Spring or other attendees,  
16           that you were not going to give him a ride home  
17           that evening?

18      A     No.

19      Q     At some point that evening you decided not to give  
20           him a ride home, correct?

21      A     Yes.

22      Q     And I understand from reading testimony at the  
23           inquest that basically your wife felt it was  
24           somebody else's turn; is that an accurate  
25           statement?

1 A Yes.

2 Q And was that based upon the fact that you had done  
3 it twice before and she was involved in that twice  
4 before?

5 A Exactly.

6 Q Okay. And what time did that occur? Meaning,  
7 because of speaking with your wife you decided not  
8 to give him a ride home?

9 MR. FREDERICKS: You mean, when was the  
10 conversation with his wife?

11 MR. BERTLING: Yeah. When did he reach  
12 the decision not to give him a ride home?

13 MR. FREDERICKS: Well, that's a different  
14 question.

15 MR. BERTLING: Well, that's the one I  
16 want answered.

17 BY MR. BERTLING:

18 Q When did you decide not to give him a ride home?

19 A I believe when we left.

20 Q And I'm sorry, you said that was around ten  
21 o'clock?

22 A Yes.

23 Q Did you look for Mike anywhere at that point to  
24 communicate that to him?

25 A No.

1 Q When you arrived at the party earlier that evening,  
2 you were able to look into the main bar and see  
3 Mike in there drinking?

4 A No.

5 Q How did you learn that he was in the main bar?

6 A We walked to the main bar.

7 Q I see. When you left did you look in the main bar  
8 at all?

9 A I did not.

10 Q Just give me a second. How did you learn of the  
11 accident that occurred later that evening?

12 A Phone call Saturday morning.

13 Q Did you -- strike that. Who called you?

14 A Actually I didn't take the call, my wife did.

15 Q Who was that, do you recall?

16 A I believe it was my brother, Al.

17 Q Did you make any phone calls yourself personally in  
18 response to that phone call?

19 A No, I did not.

20 Q After the accident on the following Monday I assume  
21 there was a staff meeting?

22 A Normal Monday morning.

23 Q Was this accident discussed at the staff meeting?

24 A It was talked about, yes.

25 Q Was there any discussion at the staff meeting about



1 THE COURT: Is your right hand raised?  
2 Is it raised, sir?  
3 MR. OEHLDRICH: Yes, sir.  
4 THE COURT: Okay.  
5 JAMES R OEHLDRICH,  
6 having been called as a witness on behalf of the  
7 State, having been first duly sworn, testified as  
8 follows: (telephonically)  
9 DIRECT EXAMINATION  
10 BY MR. BUCHER:  
11 Q Mr. Oehldrich, this is Paul Bucher, district  
12 attorney. I'm going to ask you some questions  
13 concerning blood alcohol concentration. Is that  
14 acceptable?  
15 A Yes, it is.  
16 Q And we talked briefly before today, and I sort of  
17 gave you background, as far as some of the  
18 information we have?  
19 A Yes, you did.  
20 Q Could you state your name, please and spell your  
21 last name?  
22 A James Robert Oehldrich, O-e-h-l-d-r-i-c-h.  
23 Q And your occupation, sir?  
24 A Forensic toxicologist.  
25 Q With what agency?

1 A I am with the Wisconsin Department of Justice State  
2 Crime Lab Milwaukee.

3 Q And as a forensic toxicologist, briefly could you  
4 describe your function for the jury?

5 A My duties are to accept evidence.

6 Q Yes.

7 A Appropriate agencies analyze that evidence for the  
8 presence of alcohol, drugs, poisons, to write a  
9 report of my findings, and testify in court if  
10 necessary, and maintain a chain of custody on all  
11 evidence that I am responsible for.

12 Q And you do this on a fairly regular basis, is that  
13 correct?

14 A Yes.

15 Q And you've testified in courts in the State of  
16 Wisconsin before?

17 A Yes, I have.

18 Q And have you been recognized as an expert in  
19 forensic toxicology?

20 A Yes, I have.

21 Q Now, Mr. Oehldrich, I'm referring to a case number  
22 of the Wisconsin Crime Laboratory, R, as in  
23 Richard, 985066. Are you familiar with that case,  
24 generally?

25 A Yes, I am.

1 A That is procedurally used.

2 Q In this particular case, R 985066, involving the  
3 blood of Michael T. Devine, that is the process  
4 that was utilized, is that correct?

5 A That is correct.

6 Q And the report that was filed by your agency  
7 indicates the blood ethanol concentration of his  
8 blood was .338 grams per one hundred milliliters,  
9 is that correct?

10 A That is correct.

11 Q Now, previous testimony in this case was the legal  
12 limit for an operator driving a motor vehicle,  
13 generally speaking, in Wisconsin is .10 grams per  
14 one hundred milliliters, would you agree with that?

15 A That is correct.

16 Q Now, what I have asked you to do is to give the  
17 jury some idea of what all of that means. What we  
18 have now is simply a number of .338. And what I  
19 would like you to do is possibly give the jury some  
20 idea of what that means, from a quantitative point  
21 of view, how much alcohol one would have to consume  
22 in order to get to that level, and I'm going to  
23 give you certain known and/or assumed facts and ask  
24 if you can give an opinion as to how much alcohol a  
25 person would have had to consume in order to get to

1 stream and in the bladder and ultimately in the  
2 urine?

3 A The majority is destroyed in the liver.

4 Q And the average rate of a person metabolizing  
5 varies, is that correct?

6 A That is correct. The reason we use a range that is  
7 that large is the majority of the people fall  
8 within that range.

9 Q Some people metabolize alcohol faster, some  
10 metabolize much slower?

11 A That is correct.

12 Q Depending upon the rate of metabolism, that will  
13 have an impact on the ultimate blood alcohol  
14 ethanol at a particular time?

15 A Right.

16 Q Using that fairly large range almost all  
17 individuals fall within, you are able to compute  
18 for us the average number of drinks Mr. Devine  
19 should have had?

20 A From approximately 13 drinks to approximately 17  
21 drinks.

22 Q And that would depend on his rate of metabolism?

23 A Correct.

24 Q And so if he was--

25 A The more drinks he would have to have to get to

1 BY MR. BUCHER:

2 Q Good afternoon, ma'am.

3 A Good afternoon.

4 Q Could you please state your name, and could you  
5 spell your last name for the record?

6 A Marge Kubowski, K-u-b-o-w-s-k-i.

7 Q And I know you're nervous. We spoke previously.  
8 Just try to relax. And if you have any questions  
9 of me or there is anything you want to add to your  
10 testimony, feel free to do so. We're investigating  
11 the facts and circumstances leading to the deaths  
12 of Mr. Michael Devine and Kathy Stephenson. So I  
13 have a series of questions to ask you. But, again,  
14 as I told other witnesses, ma'am, if there is  
15 something that comes to your mind that I didn't ask  
16 but you think it might be important for this  
17 inquest jury, please tell them. Tell them whatever  
18 you want. I just have some questions I want to ask  
19 you, okay?

20 A Okay.

21 Q If you don't understand what I'm asking you or  
22 anything like that, please let me know. You're  
23 employed as a bartender with the Silver Spring  
24 County Club, is that correct?

25 A Yes.

1 Q I know you do other things too, but that is one of  
2 your jobs, correct?  
3 A Right.  
4 Q How long have you been with Silver Spring County  
5 Club?  
6 A Since February or March of last year.  
7 Q February of '98, March of '98?  
8 A Right.  
9 Q You're a licensed bartender?  
10 A Yes.  
11 Q Do you recall working at Silver Spring County Club,  
12 and particularly the Universal Metrics, what we  
13 call U.M.I, holiday party on December the 4th,  
14 1998?  
15 A Yes.  
16 Q How were these parties set up? We are getting kind  
17 of a general description. Are these pretty much  
18 set up the same way, holiday parties?  
19 A Yes, they are.  
20 Q How was U.M.I. set up that night?  
21 A As far as how was it set up?  
22 Q Sorry, more specific. As far as you're concerned  
23 with the bar, was--was that inside the room, was it  
24 outside the room?  
25 A It was inside the room.

1 Q Full service bar?

2 A Yes.

3 Q How many bartenders?

4 A One.

5 Q Just you?

6 A Right.

7 Q Testimony we received is there was 57 or so people  
8 there. Is that a fairly good estimate, do you  
9 think.

10 A Yes.

11 Q So I am assuming you were pretty busy?

12 A No.

13 Q Really? Okay. Was there another bar in the  
14 premises?

15 A Yes.

16 Q And where would that have been located?

17 A There were like three other parties that night, so  
18 they are in different areas of the building.

19 Q Was there a main bar that wasn't related to any  
20 particular party?

21 A No, ugh-ugh.

22 Q Well, ma'am, as a result of the party on December  
23 4th, you were interviewed by Menomonee Falls police  
24 officers on December the 8th, 1998, do you recall  
25 that?

1           get an award?

2     A     This happened, that happened --

3     Q     Right.

4     A     -- after.

5     Q     Right. But that I'm trying to identify, that is

6           the same person we're talking about?

7     A     Yes.

8     Q     All right. The testimony has been that was Michael

9           Devine. So I just wanted to clear that up with

10          you. When-- Ms. Kubowski, when was it first

11          brought to your attention, if you know, from the

12          time people started arriving at 6:30, using that as

13          a reference point, when was it first--when were you

14          first concerned that this guy has had too much to

15          drink?

16    A     After dinner. And they did some kind of gifts,

17          awards and things going on. It was later in the

18          evening. There weren't that many people drinking

19          at that party, so-- He at one point came up and

20          ordered, asked for beer. And I said, "Excuse me?"

21          Because I didn't understand him.

22    Q     Because his speech was slurred or--

23    A     Yes. So then at that point I told him that I can't

24          serve him any alcohol, that he has had enough to

25          drink, and that he can't drive home from this party



1 Q Tell me, tell the jury, please.

2 A I can't tell you for sure when, I wasn't paying  
3 that much attention to what time things were going  
4 on at this particular party. People just were  
5 making different comments about him. And at one  
6 point he came up to the bar and ordered a beer, and  
7 that is when I noticed that he had too much to  
8 drink and I couldn't serve him.

9 Q Fine, I'll leave that alone. Do you recall at that  
10 point expressing concern that he should not drive,  
11 or he should get a ride?

12 A That's correct.

13 Q How did you express, did you verbalize that?

14 A Yes, I did, more than once.

15 Q And did you get any response from anybody?

16 A Yes, I did.

17 Q From who?

18 A A guy that was standing by the bar that was  
19 standing next to this particular guy that was not  
20 getting anything else to drink.

21 Q What kind of response did you receive?

22 A He acted like I was kidding at first, you know. He  
23 kind of chuckled back. And I said, "I'm being very  
24 serious. This man needs a ride home. He cannot  
25 leave this country club in this condition." And he

1        said, "Don't worry, I'll give him a ride." And I  
2        said, "Are you sure?" And he said, "I promise I'll  
3        give him a ride home." So then I went about my  
4        business of getting my station cleaned up and did  
5        not notice when these people left.

6        Q     After getting that assurance from this person, did  
7        you put a drink or a beer on the bar area in front  
8        of this Mike or in front of this person?

9        A     After that? No.

10       Q     At the same time, I mean.

11       A     I think when he ordered it I went over, reached for  
12       a beer, and at that point I said, "I can't give you  
13       this drink. I can't serve you this beer."

14       Q     All right. And then shortly around that same time  
15       you got the assurance from this person, he would  
16       give him a ride?

17       A     Right.

18       Q     Then you went about your business?

19       A     That's right.

20       Q     And the only two names you recall that come to your  
21       mind off the name tag was Mike and John?

22       A     Correct.

23       Q     Let me just ask you, you also told the Menomonee  
24       Falls Police Department that this Mike, in addition  
25       to ordering, trying to order beer, he went--would

1 is no duty. It doesn't matter if you fall  
2 within the purview of 125.035. That's all I  
3 have to say.

4 THE COURT: Mr. Reid.

5 MR. REID: Very briefly, Judge,  
6 I agree with what counsel said. I would  
7 appreciate it if the Court could tell us  
8 whether the Court finds Devine inside or  
9 outside the scope of this. If he's inside, I'm  
10 out on a policy exclusion. If he is outside  
11 the scope of employment, I don't think UMI had  
12 a duty, and I'm out that way.

13 As to Mr. Kreuser, what the  
14 plaintiff is alleging is that his comment  
15 assisted in the procurement of alcohol for  
16 Devine. Again, it was squarely within Section  
17 125. But if the Court doesn't accept that  
18 reason, again the testimony from Mr. Kreuser in  
19 his deposition is uncontradicted. He had an  
20 opportunity to say I was doing this as the  
21 employee. He was a good, honest witness and  
22 said I wasn't doing in it the scope of my  
23 employment, and that to me is the issue right  
24 there.

25 THE COURT: The problem I have

1 with Mr. Kreuser's part is that the Court of  
2 Appeals in this Gritzner case, quoting from  
3 324A of the Restatement said: "One who  
4 undertakes gratuitously or for consideration to  
5 render services to another which he should  
6 recognize is necessary to for the protection of  
7 a third person is subject to liability to the  
8 third person for physical harm resulting from  
9 his failure to exercise reasonable care if: (1)  
10 his failure increases the risk of harm; (2) he  
11 has assumed a duty already owed; or (3) the  
12 harm is suffered because of reliance of the  
13 other or third person."

14 And as noted, that case points  
15 out the provision of the Restatement which was  
16 adopted by our Supreme Court in American Mutual  
17 Liability Insurance Company versus St. Paul  
18 Fire & Marine Insurance Company 48 Wis. 2d 305.

19 Under that decision, I guess, is  
20 that liability may be imposed on one who having  
21 no duty to act gratuitously undertakes to act  
22 and does so negligently. The linchpin of the  
23 duty under this provision is the actor's  
24 gratuitous undertaking to another which the  
25 actor should recognize is necessary for the

1 protection of a third person.

2 MR. REID: Frankly, as I sit  
3 here, I can't recall if that's a drinking case  
4 because they cited out of -- for example, the  
5 fifth claim which isn't one; that is,  
6 Mr. Kreuser was outside the scope of his  
7 employment.

8 THE COURT: No. I'm not  
9 referring directly to what you said, I'm  
10 referring collectively to what was said.

11 MR. REID: It's not a drinking  
12 case, I think.

13 THE COURT: I know, but -- There  
14 was a sexual assault of a child, I guess.  
15 That's what was involved in that. And the  
16 Court seemed to be carving out exceptions where  
17 a child is involved or where one assumes this  
18 kind of duty, whether it's gratuitous or not.

19 MR. REID: I guess what I'm  
20 saying to the Court is the way to reconcile  
21 that second Restatement with Section 125 is  
22 exactly what Mr. Kreuser did if plaintiff were  
23 in some fashion to be able to help Mr. Devine  
24 procure alcohol.

25 THE COURT: No. [The impression

1 that I'm getting is that he offered to drive  
2 him home knowing that he was intoxicated and  
3 then didn't. And then Mr. Devine unfortunately  
4 decided to drive home and resulted in the fatal  
5 accident, just a terrible tragedy that  
6 occurred. And apparently there was no question  
7 that he was intoxicated. Everyone agreed he  
8 had quite a bit to drinking. This is one of  
9 those terrible tragedies that sometimes result  
10 in bad law. I'm not sure how these events are  
11 gonna come out, but I think as to everyone  
12 involved but Mr. Kreuser in Greene versus  
13 Farnsworth, the case that's been quoted, has  
14 been quoted repeatedly here, is controlling.

15 The statute provides that: "A  
16 person is immune from civil liability arising  
17 out of the act of procuring alcohol beverages  
18 for or selling, dispensing, or giving away  
19 alcohol beverages to another person." And the  
20 legislative history is extensively discussed in  
21 Doering versus Stamper, that's D-O-E R-I-N-G  
22 versus Stamper, S-T-A-M-P-E-R, 193 Wis.2d 118.

23 The Court said in response to  
24 the theory advanced by Mr. Bertling in that  
25 case, in Greene, the Court said, in abolishing

1 liability for those who supply alcohol to  
2 adults, the legislature clearly intended to  
3 completely immunize such person from all civil  
4 liability, regardless of the number of people  
5 involved or the particular label used by  
6 artfully drafted pleadings.

7 The Gritzner case, I think,  
8 applies as far as Mr. Kreuser is concerned. I  
9 think it's clear the evidence is undisputed  
10 that this was a Christmas party that was  
11 attended by employees by invitation, were free  
12 to come or not come to the party. They were  
13 free to drinking alcoholic beverages or  
14 non-alcoholic beverages or no beverages. The  
15 mere fact that they were there by invitation, I  
16 don't think makes it within the scope of their  
17 employment. Otherwise, every wedding reception  
18 that we attend, I suppose, would make us  
19 somehow part of the wedding party.

20 And also, the fact that  
21 Mr. Devine was driving home in his own  
22 automobile, chose the route that he was going  
23 to travel and was away from the party at the  
24 time that the fatal accident occurred, all, in  
25 my estimation, takes it out of the employment

1 situation. And I believe that neither the  
2 party nor the participants in the party were  
3 acting within the scope of their employment and  
4 that Mr. Devine was not operating within the  
5 scope of his employment at the time that the  
6 accident occurred.

7 And I so find -- I'm not sure  
8 what, as far as Mr. Kreuser is concerned -- I  
9 think I'm bound by the decision of the  
10 appellate court who, which appears to impose  
11 liability on his gratuitous offer to drive  
12 Mr. Devine home.

13 So as to all but Mr. Kreuser,  
14 the motion is granted. Mr. Kreuser, as to  
15 Mr. Kreuser, the motion is denied.

16 MR. BERTLING: That would be  
17 Mr. Kreuser and Sentry Insurance, his  
18 personal --

19 THE COURT: Yes.

20 MR. REID: Your Honor, I just  
21 have one request. Back in October, we had a  
22 scheduling conference, and since everyone  
23 agreed to stay all the issues except insurance  
24 coverage in this scope of employment issue, and  
25 the rest is because we're in part funding the



IN THE SUPREME COURT  
FOR THE STATE OF WISCONSIN

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RICKY D. STEPHENSON, Individually  
and as Personal Representative for the  
ESTATE OF KATHY M. STEPHENSON,

Plaintiff-Respondent,      Appeal No. 00-1397

vs.

UNIVERSAL METRICS, INC.,  
WEST AMERICAN INSURANCE COMPANY  
and AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

Defendants,

and

JOHN H. KREUSER and SENTRY  
INSURANCE, a mutual company,

Defendants-Appellants-Petitioners.

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Milwaukee County  
Appeal Taken From The Decision Dated May 15, 2001  
Of The Court of Appeals, District I, Before  
Presiding Judge Charles B. Schudson

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**REPLY BRIEF AND SUPPLEMENTAL APPENDIX  
OF DEFENDANTS-APPELLANTS-PETITIONERS**

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## ARGUMENT

### **I. DUTY AND PUBLIC POLICY**

Stephenson argues that Kreuser is trying to confuse the Court, when in fact Kreuser has accurately cited the general rules on duty in Wisconsin. It is Stephenson who is trying to alter the long-standing rules on duty: "In this case, a special relationship was created when Kreuser voluntarily undertook Devine's duty owed to third parties." (p. 14 of his brief) (emphasis added). Stephenson's narrow concept that a "special relationship" must exist before liability may attach has long been abandoned in Wisconsin: "The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harm to person or harmed interest is unknown at the time of the act." A.E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 483, 214 N.W.2d 764 (1974).

"A person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject him or his property, or the person or property of another, to an unreasonable risk of injury or damage."

Rockweit v. Senecal, 197 Wis. 2d 409, 424, 541 N.W.2d 742 (1995)  
(quoting Shannon v. Shannon, 150 Wis. 2d 434, 443-44, 442 N.W.2d 25 (1989)).

Stephenson argues that because of a typo on page 14 of Kreuser's brief, Kreuser has changed the meaning of the citation, when in fact substituting "do" for "need" does not change the meaning of that quote:

Under Wisconsin's broad definition of duty, we need not engage in analytical gymnastics to arrive at our result by first noting that at common law, a person owes no duty to control the conduct of another person or warn of such conduct, and then finding exception to that general rule where the defendant stands in a special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of the conduct. See, e.g., Restatement (Second) of Torts §§ 314-20 (1965), and Tarasoff, 17 Cal. 3d at 435-36, 551 P.2d at 343, 131 Cal. Rptr. at 23.

Schuster v. Altenberg, 144 Wis. 2d 223, 238 n.3, 424 N.W.2d 159 (1988) (emphasis added).

Kreuser accurately cites Dixson v. Wisconsin Health Org. Ins., 2000 WI 95, ¶ 42, 237 Wis. 2d 149, 612 N.W.2d 721 (J. Abrahamson, dissenting) (emphasis added) ("This Court has not adopted the Restatement provisions regarding the voluntary assumption of duties in evaluating negligence claims"), and Gritzner v. Michael R., 2000 WI 68, ¶ 5, 235 Wis. 2d 781, 611 N.W.2d 906 (emphasis added) ("We would recognize the Gritzners' claim for negligent failure to control only because liability for failure to control can be imposed on distinct, narrow grounds that do not raise the same public policy considerations that preclude liability for failure to warn").

Gritzner appears to have recognized negligent failure to control on “distinct, narrow grounds” because it was premised upon *in loco parentis* (2000 WI 68 at ¶¶ 48-69). *In loco parentis* is not involved here. Kreuser was not Devine’s parent, he was not babysitting Devine, and he had no duty to control Devine. Stephenson cites no authority for the proposition that a party guest stands *in loco parentis* to another guest, that a party guest is babysitting other guests at the party, or that a party guest has a “duty to control” another guest.

Further, comparing the complaint in Gritzner to the one here reveals different facts and theories of liability. The Gritzners’ complaint alleged that Bubner (1) negligently failed to warn the Gritzners of Michael’s propensity to engage in inappropriate sexual acts, and (2) negligently failed to control Michael’s conduct. Id. at ¶ 11. Stephenson’s complaint alleges that upon Kreuser’s assurance to the country club that he would drive Devine home, the club continued to serve Devine alcohol, which led to his impairment, which in turn caused the accident. (¶¶ 39-46 Amended Complaint; R.12; Ap. pp. 122-123.)

Stephenson states on page 3 of his brief: “No where in the trial court’s decision regarding Kreuser is there a direct reference or, even an inference, that the denial was based upon an allegation of continued alcohol consumption by Michael Devine.” Stephenson makes a

similar comment on page 26 of his brief. His statements are not accurate. During the Court's colloquy with Kreuser's counsel at the summary judgment hearing, the following transpired:

THE COURT: But didn't Kreuser offer to drive the guy home?

MR. FREDERICKS: Right.

THE COURT: And on that basis, he was allowed to continue drinking. And then Kreuser for some reason didn't drive him home. Doesn't that fall within the Gritzner case?

(R.47; Supp. Ap. pp. 202-203) (emphasis added). Clearly, the trial court had exactly in mind the continued consumption of alcohol.

Continuing in the same vein, Stephenson now suggests that this case has nothing to do with alcohol consumption after Kreuser nods his head (or if one believes the bartender after Kreuser verbally responds). Stephenson's repeated attempts to distance himself from his own allegations is curious. Stephenson expressly states in paragraphs 39 through 46 of his amended complaint that, upon assurance of Kreuser that Devine could continue to drink, the bartender continued to serve alcoholic beverages to Devine. (R.12; App. pp. 122-123.) Paragraphs 39 through 46 are not pleaded in the alternative. Each paragraph flows from the other, resulting in Stephenson's conclusion that Kreuser's assurance to the country club

that he would drive Devine home led to Devine's intoxicated state, which in turn caused the accident.

Assuming *arguendo* that the Supreme Court would substantially amend Stephenson's claims at this point, and that Stephenson would only argue that Kreuser had a duty to drive Devine home regardless of whether Devine consumed additional alcohol after Kreuser's duty arose, that would not change the issues. Regardless of how Stephenson rewords his claim, Kreuser's alleged negligence still arises out of Devine drinking too much alcohol. It was Devine's intoxication that caused the accident. This Court must still decide whether a party guest has a duty to drive another party guest home if that guest is inebriated.

Kreuser continues to be puzzled at the degree of credibility that seems to be afforded someone who has never given testimony in this case. In addition, since there is no dispute that Kreuser did at the very least nod his head signifying his intent earlier in the evening to take Devine home, the bartender's version is irrelevant. Notwithstanding, it seems odd that the very bartenders who pumped Devine full of liquor are somehow later transformed into the voices of reason and cloaked with duty-creating authority. The bartender in the party room and other bartenders at the Silver Spring Country Club served Devine



alcohol to great excess.<sup>1</sup> Then, when the bartender decides to be “very serious” (R.30, Ap. p. 174) about all the liquor Devine has been served, the bartender now becomes a liability creator for all guests in attendance at the party. The bartender walks away free and clear from the alcohol-induced motor vehicle accident, but the guest whom she engages does not.

The Supreme Court cannot escape the inherent inequity in that situation. The best Stephenson can do to counter that is to suggest that the taxi hypothetical is incomplete because the taxi driver might not know that the customer is inebriated. Stephenson offers no response to the scenario if indeed the taxi driver knew of the inebriation.

Notably absent from Stephenson’s opposition are the scenarios outlined in pages 22-24 of Kreuser’s brief. More particularly, Stephenson at no time addresses the following:

Perhaps the most telling example of the problem with saying Kreuser can be liable in this case, is illustrated as follows. Imagine the same scenario with the host encouraging his or her guest to drink to excess and drive home in that inebriated state. If, earlier in the evening, the host (the one who purchased, furnished and served the alcohol to the guest) indicated that he or she was going to take the guest home, and then for whatever reason the host did not or could not take the guest home, the host would not be liable because the host is immune as a “provider” of alcohol under sec. 125.035. However,

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<sup>1</sup> Devine’s blood test came back at .338, more than three times the legal limit. (R.30; Ap. pp. 168-169, 176-177.) Of all the alcohol served by the country club, there is nothing in the current record as to how much was served by bartender Kubowski versus other bartenders.

if a guest gave the indication that he or she would take the inebriate home, then the guest is not immune and is liable.

(Petitioner's Brief, p. 23.) Perhaps Stephenson did not respond because there can be no response other than agreement that there is no logical justification for allowing the literal provider of alcohol to be absolved from liability but not the mere guest. For Stephenson not to address this important issue, yet call Kreuser "more than a little disingenuous" (p. 22 of his brief), represents his concession of the dilemma.

Stephenson suggests more than once (pp. 7, 8 & 20 of his brief) that UMI was "prepared" to provide a ride home to anyone who was intoxicated, intimating that UMI was actively looking for people who were intoxicated and had thereby already agreed that they had a duty to drive somebody home. Stephenson's extension of the facts in that regard, which Kreuser would submit is not entirely accurate, more appropriately belongs in the companion appeal No. 00-1947, in which Petitions for Review remain pending.<sup>2</sup>

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<sup>2</sup> However, that issue is not insignificant here. This was an employer-sponsored party. The employer was dismissed as immune, but one of its management employees was not. Accepting Stephenson's extension of the facts for the moment, the employer UMI had a duty to drive inebriates home (pp. 7, 8 & 20 of his brief) and, therefore, so did the management employee Kreuser. However, Stephenson accepts the fact the employer is immune because he did not seek review of that part of the Court of Appeals decision. If the employer who was "prepared" to drive anyone home who was inebriated is not liable, Stephenson cannot reasonably argue that one of its management employees is liable.

Finally, Stephenson suggests that the Supreme Court should not deal with public policy. The Supreme Court has stated, however, that whenever the court finds that an act or omission to act does not constitute negligence because there was no duty, the court is really making a policy determination. See, e.g., Bowen v. Lumbermens Mut. Casualty Co., 183 Wis. 2d 627, 644-45, 517 N.W.2d 432 (1994); Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 183, 77 N.W.2d 397 (1956). Where the issue is fully presented by the complaint and answer, such as it is here, the court may make the policy determination before the jury trial. Miller v. Walmart Stores, Inc., 219 Wis. 2d 250, 265, 580 N.W.2d 233 (1998).

## **II. SECTION 125.035**

Stephenson ignores virtually all of Kreuser's argument that sec. 125.035 applies to him, in particular:

- His own pleadings which expressly allege that Kreuser's assurance that he would drive Devine home led to the country club continuing to serve Devine alcohol beverages.
- The definition and application of "procuring" as discussed in several cases cited by Kreuser: Miller v. Thomack, 210 Wis. 2d 650, 563 N.W.2d 895 (1997); Greene by Schoone v. Farnsworth, 199 Wis. 2d 365, 525 N.W.2d 107 (Ct. App.

1994); and Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 461 N.W.2d 150 (Ct. App. 1990).

- The application of Miller and Greene to the facts in this case.

Since not once does Stephenson mention Miller or Greene, the Supreme Court should accept their application to this case. Under Greene, Kreuser can actually encourage Devine to drink and drive, but not be liable. According to the Court of Appeals here, however, where Kreuser is not Devine's drinking companion and does not encourage Devine to drink and drive, Kreuser can be liable.

Plaintiff's argument is that Kreuser's liability arises out of Devine's excessive consumption of alcohol and subsequent operation of a motor vehicle. Greene rejects liability under this scenario.

No matter how imaginatively Stephenson words his claim, Kreuser's alleged negligence arises out of Devine's voluntarily drinking himself to intoxication at the party. Stephenson cannot get around the consumption of alcohol as being a cause of the accident. This falls precisely within the statute.

Party guests should be afforded the same immunity that all others associated with the procurement of alcohol are afforded. The liquor liability immunity statute was not meant to only afford immunity to the country club or employer who served and paid for the

alcohol that Devine consumed. If taverns, hosts, businesses and drinking companions are immune, then non-drinking companions like Kreuser should likewise be immune. Without reversal by the Supreme Court, the law is that if one is intimately involved with the providing of alcohol, he or she is immune; but if one is only transiently involved (a non-drinking companion offering a ride), he or she is not immune.

### CONCLUSION

For the foregoing reasons, Kreuser and Sentry respectfully request that the Supreme Court reverse the Court of Appeals and remand the case to the trial court directing the trial judge to grant Kreuser and Sentry's motion for summary judgment dismissing them from this case.

Respectfully submitted this 25 day of October, 2001.

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### CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), STATS., for a brief produced using the following font:

- ☐ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side, and 1 inch margins on the other 3 sides. The length of this brief is \_\_\_\_\_ pages.
- ☒ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,262 words.

Dated this 25 day of October, 2001.

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## **SUPPLEMENTAL APPENDIX**

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1 Silver Spring Country Club, which is the club  
2 here that had the party that literally served  
3 the alcohol, literally had the bartender  
4 working in the place. The law immunizes them.

5 It would be inconsistent to  
6 immunize them, but not the employer and their  
7 employees as acting as associate hosts. There  
8 is something very inconsistent about that, and  
9 I don't think it would be appropriate to pass  
10 on the statutory immunity down to the employer  
11 who happened to hire this particular club to  
12 host.

13 The Silver Spring Club is a  
14 licensed facility, allowed to serve alcohol in  
15 the State of Wisconsin, and therefore isn't  
16 immune under the statute. I think in terms of  
17 the statute, particularly the word procure,  
18 covers within it, within its umbrella, the  
19 employer and its employees. Thank you.

20 THE COURT: But didn't Kreuser  
21 offer to drive the guy home?

22 MR. FREDERICKS: Right.

23 THE COURT: And on that basis,  
24 he was allowed to continue drinking. And then  
25 Kreuser for some reason didn't drive him home.



1 Doesn't that fall within the Gritzner case?

2 MR. FREDERICKS: I don't think,  
3 Judge -- First of all, it is true that early on  
4 in the evening, John Kreuser motioned to the  
5 bartender, don't worry, in some words, but I'll  
6 take care of Mr. Devine. Yet the bartender, by  
7 the way, still served him the drinks.

8 Later on in the evening, the  
9 Kreuser family, he and his wife, changed their  
10 minds and went home. He did not, however,  
11 encourage Mr. Devine to drink, nor did they  
12 serve him alcohol. So I still think that  
13 Mr. Kreuser falls within the ambit of the  
14 statute, and I think the dispositive case is  
15 Greene.

16 Let's take, for instance, if the  
17 plaintiffs were to argue that by Mr. Kreuser  
18 offering to Mr. Devine a ride home, he was in  
19 fact encouraging Mr. Devine to drink to excess.  
20 I don't think that's true, but let's say  
21 Mr. Bertling is going to make that argument. I  
22 think the Greene case falls squarely on that,  
23 and I think immunity would apply to  
24 Mr. Kreuser.

25 THE COURT: That's not what the